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Notes and Comments

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Administrative Law—Judicial Review and Separation of Powers

In re Varner[1] involved an action instituted in superior court for a temporary injunction to restrain enforcement of the county board of education's assignment of Varner to a school in Randolph County until a final decision could be had on an appeal from the action of the board in denying Varner's application for reassignment to a school in Davidson County. The temporary injunction was granted and the supreme court not only sustained the injunction, but also stated that the pending superior court review of the board action denying reassignment would be a matter de novo before the superior court. The superior court would have the same powers, duties, and standards to guide it as the board had in the first instance, and there should be a determination by jury trial as to whether the student was entitled to reassignment to another school.

The legislature has given county and city school boards authority to assign students within their districts to appropriate schools[2] with right of appeal from such action to the superior court.[3] The statutory appeal provision requires a de novo review in the superior court. It directs that court, in the event the board's decision is set aside, to make a reassignment to such school as the court finds the student is entitled to attend.[4] In *Varner* the court did not discuss the question of whether such a statute would be unconstitutional on the ground that it requires the court to perform a non-judicial function in violation of the constitutional mandate that governmental functions be separate and distinct,[5] and the constitutional provision vesting courts with judicial power.[6]

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[1] 266 N.C. 409, 146 S.E.2d 401 (1966).
[2] N.C. GEN. STAT. § 115-176 (1960).
[3] N.C. GEN. STAT. § 115-179 (1960).
[4] N.C. GEN. STAT. § 115-179 (1960):
Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. . . . If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend. . . .
[5] N.C. CONST. art. I, § 8.
[6] N.C. CONST. art. IV, § 1.

Basically, the legislature may confer jurisdiction upon courts for limited review of administrative decisions without constitutional difficulties.[7] The general rule, however, is that the constitutional limitation of courts to the exercise of judicial power has been violated when a court upon review is required or permitted to substitute its judgment or discretion for that of the agency as such exercise of judgment and discretion is an administrative function.[8] The underlying rationale seems to be that the constitution vests in courts only judicial power, and the performance of a function that is administrative is not within the power of the court.

The question of whether a judicial or non-judicial function is exercised upon review of administrative decisions is not always easy to answer. The United States Supreme Court has held that Congress could vest the Court of Appeals for the District of Columbia with power to substitute its judgment for that of the Radio Commission upon review of the commission's determination of whether a radio broadcasting license should issue. Although such a function is administrative, it could be vested in that court since it is not created under the Judiciary Article of the Constitution.[9] However, since the Supreme Court is created under the Judiciary Article and therefore vested with judicial power only, the Court held that it could not participate in the administrative process by hearing an appeal from a proceeding in the court of appeals pursuant to its statutory authority to exercise such administrative functions.[10] Later the Radio Act[11] was amended by limiting the scope of review in the court of appeals to questions of law and providing that the findings of fact by the commission would be conclusive unless found to

[7] Harrison v. Civil Serv. Comm'n, 1 Ill. 2d 137, 115 N.E.2d 521 (1953); Massachusetts Bonding & Ins. Co. v. Commissioner of Ins., 329 Mass. 265, 107 N.E.2d 807 (1952); *In re* Wright, 228 N.C. 584, 46 S.E.2d 696 (1948); Fire Dep't v. City of Fort Worth, 147 Tex. 505, 217 S.W.2d 664 (1949).

[8] Peterson v. Livestock Comm'n, 120 Mont. 140, 181 P.2d 152 (1947); Fuller v. Mitchell, 269 S.W.2d 517 (Tex. Civ. App. 1954); see generally, 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10 (1958).

[9] U.S. CONST. art. III. This article, vesting the courts with only judicial power, does not limit the jurisdiction that Congress can confer upon the courts of the District of Columbia as Congress can confer upon those courts broader jurisdiction pursuant to its legislative power over the District under Article I. Congress can vest the courts of the District "not only with the powers of federal courts in the several states but with such authority as a State may confer on her courts." Keller v. Potomac Electric Co., 261 U.S. 428, 443 (1923).

[10] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[11] Radio Act of 1927, ch. 169, 44 Stat. 1162.

be arbitrary or capricious.[12] Under these circumstances the Supreme Court held it did have the power to hear appeals from the reviewing court as the reviewing court was then limited to the exercise of a judicial function. The Court noted that the questions of law were whether the commission applied legislative standards validly set up, whether it acted within the authority conferred, and whether its proceedings satisfied the requirements of due process. It felt that these were appropriate questions for judicial decision.[13] Apparently the Court feels the determination of the legality of administrative action is judicial whereas actual participation in the administrative process by the exercise of independent judgment or discretion as to what the decision of the agency should have been is not judicial.[14]

The question thus presented is not whether the original function was judicial but whether the question presented on appeal requires the exercise of a judicial or non-judicial function. One test employed is a determination of whether the question on review is of the type that courts traditionally decided or whether it is of the kind traditionally handled by the legislature prior to the rise of administrative agencies.[15] Among the specific functions held to be administrative[16] and not exercisable by the courts are the granting or revoking of liquor licenses[17] and banking franchises,[18] the fixing of rents,[19] the selection of school sites,[20] the determination of attorneys' fees in proceedings before the Industrial Commission,[21] and the determinations of zoning boards.[22] On the other hand the exercise

[12] Act of July 1, 1930, ch. 788, 46 Stat. 844, amending 44 Stat. 1169 (1927).

[13] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[14] *Compare* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) *with* Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930) *and* Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923).

[15] Floyd v. Department of Labor & Indus., 44 Wash. 2d 560, 269 P.2d 563 (1954).

[16] The examples are merely illustrative and by no means exhaustive.

[17] De Mond v. Liquor Control Comm'n, 129 Conn. 642, 30 A.2d 547 (1943).

[18] Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

[19] Baldwin Gardens v. McColdrick, 198 Misc. 743, 100 N.Y.S.2d 548 (Sup. Ct. 1950).

[20] Board of Educ. v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1956).

[21] Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

[22] Illinois Bell Tel. Co. v. Fox, 402 Ill. 617, 85 N.E.2d 43 (1949). Here the court held that it was not exercising the administrative function since the review was limited to the question of the legality of the board action.

of a judicial function is required in the determination of whether an agency acted upon authority which could be conferred upon it constitutionally,[23] acted within its statutory authority,[24] acted arbitrarily or capriciously,[25] or in disregard of law,[26] and whether it based its decision on insufficient or incompetent evidence,[27] or committed other errors of law.[28] The North Carolina court appears to have recognized the distinction in *Pue v. Hood*.[29] There the court refused to grant certiorari to review the action of the Commissioner of Banks in denying an application for a franchise. The reasoning was that the action of the commissioner was an administrative function and that there would be no judicial question on review in the absence of allegations as to the unconstitutionality of the Banking Act or allegations of errors of law. The court said:

> The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers.[30]

The decision implies, however, that the determination of the constitutionality of the legislative act and the question of whether errors of law were committed would require the exercise of judicial power. It thus appears that the line is drawn between a determination of the legality of the administrative action and the exercise of the precise function entrusted to the agency or officer.

Statutes that confer jurisdiction for de novo review of administrative decisions further complicate the distinction between judicial and non-judicial functions. Upon de novo review does the court decide the same issue presented in the administrative proceeding, or does it merely determine the legality of the administrative decision?

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[23] Texas Liquor Control Bd. v. Jones, 112 S.W.2d 227 (Tex. Civ. App. 1937).

[24] State Bd. of Medical Registration v. Scherer, 221 Ind. 92, 46 N.E.2d 602 (1943).

[25] Burton v. City of Reidsville, 243 N.C. 405, 90 S.E.2d 700 (1956).

[26] *Ibid.*

[27] Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022 (1942).

[28] Brice v. Robertson House Moving, Wrecking & Salvage Co. 249 N.C. 74, 105 S.E.2d 439 (1958).

[29] 222 N.C. 310, 22 S.E.2d 896 (1942).

[30] *Id.* at 314, 22 S.E.2d at 899.

Some courts hold that since de novo review permits the finding of facts anew, it also permits the court to substitute its own independent judgment or discretion for that of the agency upon the facts as found by the court.[31] In so holding those courts do not raise the questions of whether such action would constitute the exercise of a non-judicial function and whether the exercise of a non-judicial function would be permissible. On the other hand, the Connecticut Supreme Court has recognized that the legislature could not vest the judiciary with power to grant or revoke licenses—an administrative function. It interpreted a statute granting de novo review of licensing board decisions not to be a grant of power to substitute its judgment for that of the board, but merely to mean the court would not be confined to the facts found by the board in making its independent judgment as to whether the board acted legally.[32] Also, in Texas it is held that a review de novo of administrative decisions does not vest the courts with the administrative function of determining whether a license, permit, or certificate of convenience should issue, but merely gives the courts authority to determine whether the action of the agency was beyond the power it could exercise constitutionally, beyond its statutory power, or based upon substantial evidence.[33] The North Carolina court applied similar reasoning in *In re Wright*[34] where the court found that a de novo review of the revocation of a driver's license required the exercise of a judicial and not an administrative function. The decision was based on the fact that no discretion was given the court to grant or revoke the license and the court had authority only to review the facts upon which the agency based its decision.

In view of the foregoing analysis it does not appear that the question of whether a judicial or an administrative power is exercised is concluded by whether or not the court is required to find facts anew. It is the type of determination the court is required or permitted to make upon such facts found that determines the nature

[31] Carnegie v. Department of Pub. Safety, 60 So. 2d 728 (Fla. 1952); Dimitroff v. State Indus. Acc. Comm'n, 209 Ore. 316, 306 P.2d 398 (1957); Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939); Harrison v. Hopkins, 48 R.I. 42, 135 Atl. 154 (1926).

[32] De Mond v. Liquor Control Comm'n, 129 Conn. 642, 30 A.2d 547 (1943).

[33] Texas Liquor Control Bd. v. Jones, 112 S.W.2d 227 (Tex. Civ. App. 1937).

[34] 228 N.C. 584, 46 S.E.2d 696 (1948).

of the power exercised.[35] It appears that a determination as to the legality of an administrative decision, although made upon de novo review, requires a judicial determination, whereas a determination of whether a license should be revoked or an assignment made to one school or another requires the exercise of administrative power.

If the review of reassignment proceedings in *Varner* had been merely de novo, it appears that an interpretation in favor of its constitutionality could have been had. However, the court correctly interprets the statute to vest the court with the authority to make the assignment to such school the court finds the student is entitled to attend.[36] Such authority is the same authority originally given the administrative agency.[37] The exercise of this authority by the courts seems inconsistent with the constitutional provisions vesting courts with judicial power[38] and requiring governmental functions to be separate and distinct.[39] Indeed, the court stated in *Burton v. City of Reidsville*:[40] "In any event, we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials."[41]

It is submitted that the court should decline to exercise the administrative function of assigning students to schools and confine its review to the question of the legality of the administrative decision. It may be argued that there is little difference in holding the decision of an agency to be arbitrary or capricious on the one hand and entering an order for reassignment on the other. But such an argument disregards the historical experience with tyrannical government giving rise to the separation philosophy. It also ignores the need for separation in obtaining more efficient administration of governmental functions. A consequence of requiring or permitting courts to make these administrative determinations could be the burdening of the courts with an almost infinite volume of such determinations

[35] For a thorough analysis on this point see Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022 (1942).

[36] Consider the language of the act as quoted in note 5 *supra*. For the court's interpretation see *In re* Varner, 266 N.C. 409, 417, 146 S.E.2d 401, 409 (1966); *In re* Hayes, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964).

[37] N.C. GEN. STAT. § 115-176 (1960).

[38] N.C. CONST. art. IV, § 1.

[39] N.C. CONST. art. I, § 8.

[40] 243 N.C. 405, 90 S.E.2d 700 (1956).

[41] *Id.* at 408, 90 S.E.2d at 703.

to the detriment of efficient performance of their judicial duties. A further consequence would be the frustration of the primary objective sought by creation of administrative agencies, *i.e.*, to provide for disposition of specialized and complicated problems by agencies equipped with expert knowledge and experience essential to more efficient disposition of such problems.

JERRY M. TRAMMELL

Admiralty—Recovery of Counsel Fees as Damages in Maintenance and Cure Actions

In *Gore v. Maritime Overseas Corp.*[1] the libellant, a seaman with an extended history of back trouble, brought six consolidated admiralty actions against shipowners for maintenance and cure. Although it was impossible to establish the origin of the seaman's back condition, it was established that the libellant had had separate attacks while aboard different ships, followed by periods of remission sufficient to make him fit for duty. The owners of the ships upon which an attack occurred were found to be primarily liable for the seaman's maintenance until he again became fit for duty. The owners of the ships upon which the seaman became ill or disabled due to an attack that had occurred on a previous ship, but from which the seaman had not yet obtained maximum cure, were held to be secondarily liable for the libellant's maintenance. In each of the claims for maintenance and cure, the recovery of counsel fees was allowed as an element of damages. Secondarily liable shipowners were even awarded recovery from primarily liable shipowners of counsel fees that the former were obligated to pay the seaman.

Traditionally, counsel fees have not been an element of recovery for maintenance and cure actions.[2] However, in 1962, the United States Supreme Court in the historic decision of *Vaughan v. Atkinson*,[3] a maintenance and cure action, awarded counsel fees to the

[1] 256 F. Supp. 104 (E.D. Pa. 1966).

[2] In maintenance and cure claims, the courts have allowed consequential damages, Sims v. United States of America War Shipping Administration, 186 F.2d 972 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); and necessary expenses, Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).

[3] 369 U.S. 527 (1962), *reversing* 291 F.2d 813 (4th Cir. 1961), 200 F. Supp. 802 (E.D. Va. 1959).

libellant as an element of damage.[4] In that case, the seaman entered a United States Public Health Service Hospital five days after the termination of a voyage aboard the respondent shipowner's vessel. For approximately three months, he was treated as an inpatient for suspected tuberculosis. After being discharged, he was treated as an outpatient for two years before again being declared fit for duty. Shortly after being admitted, the libellant forwarded to the owner's agent an abstract of his clinical record at the hospital showing a strong probability of active tuberculosis. However, the owner made no investigation of the seaman's claim and did not even bother to admit or deny the validity of it.[5] As a result, for two years the libellant was on his own and ultimately had to hire an attorney to recover his claim. Though there was no precedent for allowing counsel fees as damages in a maintenance and cure action, the Supreme Court followed the logic that admiralty courts were authorized to invoke equitable principles,[6] that there is precedent for allowing counsel fees in equity actions[7] and thus, that counsel fees might be an appropriate element of recovery for maintenance and cure.[8]

As to the test that the Supreme Court used to determine when counsel fees could be recovered in maintenance and cure actions, at least two distinct views have developed. In *Vaughan*, the Supreme Court spoke of the "callous" attitude on the part of the shipowner in "making no investigation of the libellant's claim"[9] and the default of the shipowner "being willful and persistent."[10] It was found "difficult to imagine a clearer case of damages suffered for failure to pay than this one."[11] In subsequent lower court decisions the problem arose whether a callous attitude on the part of the shipowner was a prerequisite to recovery of counsel fees, or whether it merely made the case for counsel fees stronger.

[4] The court definitely stated that the question involved damages and "not the usual problem of what constitutes 'costs' in the conventional sense." 369 U.S. at 530.

[5] *Id.* at 528.

[6] See, *e.g.*, Rogers v. Paul, 232 F. Supp. 833 (W.D. Ark. 1964).

[7] See, *e.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950); The Apollon, 22 U.S. (9 Wheat.) 362 (1824).

[8] Vaughan v. Atkinson, 369 U.S. 527, 530 (1962). See Vaughan v. Atkinson, 291 F.2d 813, 816 (4th Cir. 1961) (dissent by Chief Judge Sobeloff).

[9] 369 U.S. at 530.

[10] 369 U.S. at 531.

[11] 369 U.S. at 531.

The majority of the courts dealing with this have required a finding of willful default or callous action by the shipowner before an award of counsel fees is allowed in a maintenance and cure case.[12] This is perhaps a means of refraining from too radical a departure from the general rule that counsel fees are not recoverable.[13] Thus, a shipowner who paid maintenance to a seaman until the Public Health Service certified the seaman as fit for duty was held not liable for counsel fees because he had not acted in bad faith, callously, or unreasonably.[14] Another shipowner, who depended on a prediction by the Public Health Service that the libellant would be fit for duty on a certain date, quit paying maintenance on that date although the libellant had actually failed to recover. There was no evidence that the shipowner knew of this, though there was never any investigation by the shipowner to see if the seaman had in fact recovered, or examination by the Public Health Service certifying the seaman as fit for duty. Still, attorney's fees were denied because the court could not say that the defendant acted in bad faith, callously, or unreasonably.[15] In another case, a seaman who made no claim for maintenance and cure prior to the institution of the lawsuit, was denied counsel fees because there had been no default, willful or otherwise, by the shipowner.[16] Many of these courts have specifically rejected a more liberal interpretation of *Vaughan* and have considered a showing of callousness or recalcitrance on the part of the

[12] See notes 14-17 *infra* and accompanying text.

[13] See, *e.g.*, McCORMICK, DAMAGES §§ 61, 71 (1935).

[14] Pyles v. American Trading & Prod. Corp., 244 F. Supp. 685 (S.D. Tex. 1965). The court held that good faith reliance on the Public Health Service certification enabled the shipowner to suspend maintenance payments and remove the case from the rule of *Vaughan*. It stated that the better authorities limited the Vaughan case to situations in which the defendant deliberately, flagrantly or unjustifiably refused to pay maintenance at any time. *Accord,* Diddlebrock v. Alcoa Steamship Co., 234 F. Supp. 811, 814 (E.D. Pa. 1964).

[15] Diaz v. Gulf Oil Corp., 237 F. Supp. 261 (S.D.N.Y. 1965). The court pointed out that even a flat finding by the Public Health Service that the seaman was fit for duty would not be conclusive evidence in court. The court cited Koslusky v. United States, 208 F.2d 957, 959 (2d Cir. 1953) and Diniero v. United States Lines Co., 185 F. Supp. 818, 820 (S.D.N.Y. 1960), *aff'd,* 288 F.2d 595. Thus, a prediction that the libellant will be fit for duty on a certain date would carry even less weight and could conceivable raise the duty of the shipowner to investigate the libellant's claim to determine its merit. An investigation might have clearly shown the libellant's right to maintenance and cure and might have precluded the necessity of a lawsuit.

[16] Connorton v. Harbor Towing Corp., 237 F. Supp. 63 (D. Md. 1964).

shipowner a necessary requirement for recovery of attorney's fees. These courts consider this the overwhelming majority view.[17]

Other courts have used language similar to the above test of callousness or recalcitrance in speaking of the duty of a shipowner to properly investigate the libellant's claim to determine its merits.[18] The *Vaughan* opinion noted this duty of the shipowner to properly investigate and found that the shipowner had callously breached it.[19] The principal case developing the shipowner's duty to investigate a claim for maintenance and cure with reasonable diligence was *Stewart v. S.S. Richmond.*[20] It found the shipowner's breach to be arbitrary and unreasonable in the face of the overwhelming proof of the merit of the claim. The libellant had presented the shipowner an unfit for duty certificate from the Public Health Service along with his own doctor's report that maximum cure had not been reached. The court found that the shipowner was lax in investigating a claim which they would have found to have merit.[21]

It seems possible that the duty to investigate could be negligently breached by the shipowner, so that he could become liable for the seaman's counsel fees without a specific showing of bad faith. However, there does not seem to be any authority specifically allowing recovery of attorney's fees by the seaman for the shipowner's negligent failure to investigate the merits of the maintenance and cure claim. But such a test would seem to be consistent with the liberal policies in favor of the seaman enumerated by the courts in expanding the application of maintenance and cure.

Some courts have disregarded the requirements of willful default, callous action, or breach of duty to investigate as prerequisites to the recovery of counsel fees in favor of a more liberal interpretation of *Vaughan.* These courts grant that bad faith by the ship-

[17] Roberts v. S.S. Argentina, 359 F.2d 430 (2d Cir. 1966); *cf.* Johnson v. Mississippi Valley Barge Line Co., 335 F.2d 904 (3d Cir. 1964).

[18] See notes 19-21 *infra* and accompanying text.

[19] 369 U.S. at 530.

[20] 214 F. Supp. 135 (E.D. La. 1963).

[21] When a claim for maintenance is made, there is an affirmative duty upon the shipowner to investigate the claim with reasonable diligence. . . . Moreover when there is substantial evidence that a shipowner is dilatory in making such an investigation or if it fails to make an investigation which would have disclosed the merit of the seaman's claim, the seaman may recover the damages resulting from the failure to pay maintenance as well as attorney's fees incurred in getting the maintenance from the shipowner.

Id. at 137.

owner makes the case for counsel fees stronger, but feel it is not a prerequisite to recovery. One group of opinions has interpreted *Vaughan* as meaning counsel fees are discretionary with the court. In *Hurte v. Socony-Mobil Oil Co.*,[22] the Eighth Circuit allowed counsel fees in an action for maintenance and cure with no discussion other than that the libellant can recover attorney's fees for the shipowner's failure to provide that to which the libellant was entitled. The court made no mention of the revelance of the shipowner's attitude or actions in dealing with the libellant's case. The same judge, two years later, in awarding attorney's fees in another action for maintenance and cure, simply stated that recovery was discretionary with the court.[23] Under this interpretation of *Vaughan*, recovery of counsel fees is not automatically required as a payment of damages. Valid reasons might exist for not voluntarily paying a claim. So long as the shipowner acted equitably with a bona fide desire to comply with the law, and provided maintenance that was justly and obviously due, damages by way of counsel fees would not necessarily be allowed.[24] This interpretation of *Vaughan* seems to be more in line with the policy favoring seamen in maintenance and cure actions than the interpretation that callous actions on the part of the shipowner must be shown before counsel fees are awarded. The need for callous actions places a burden on the seaman to show that the shipowner did indeed act callously, while the discretionary or honest dispute interpretation would seem to generally assume that counsel fees may be awarded in maintenance and cure actions. This would place on the shipowner the burden of showing that he is within the exception of not being liable for counsel fees because he acted equitably and an honest dispute did exist.

An even more radical departure from the requirement of a showing of callous action by the shipowner has been made by some courts. This is the theory of allowing the seaman to recover his counsel fees anytime he is forced to litigate his claim for mainte-

[22] 221 F. Supp. 885, 890 (E.D. Mo. 1963). See Smith v. Seitter, 225 F. Supp. 282, 287 (E.D.N.C. 1964); Sims v. Marine Catering Serv., Inc., 217 F. Supp. 511 (D. La. 1963).

[23] Rowald v. Cargo Carriers, Inc., 243 F. Supp. 629, 633 (E.D. Mo. 1965).

[24] The intention and purpose of the Supreme Court in *Vaughan* was that "the trial court should make the seaman 'whole,' i.e. he should not be required to pay money out of his pocket to collect maintenance lawfully due him." Vaughan v. Atkinson, 206 F. Supp. 575, 576 (E.D. Va. 1962) (on remand).

nance and cure. The payment of counsel fees by the shipowner in a litigated maintenance and cure claim is felt by such courts to be an automatic obligation that does not turn on the issue of the shipowner's recalcitrance. The main case espousing this interpretation of *Vaughan* is *Jordan v. Norfolk Dredging Co.*[25] There, according to the libellant and the finding of the court, Jordan had injured his back while aboard ship five or six months before his employment was terminated. He then reinjured his back before he left the ship and was able to continue work only with the help of his fellow deckhands. However, no complaint of back trouble was ever made to officials of the operating company until one month after the libellant had quit work. After Jordan made his claim, a company representative told him it was doubtful whether he was entitled to maintenance and cure and as a result, Jordan had to litigate his claim to recover. The court expressed grave doubts that there was any callous behavior on the part of the shipowner toward the libellant. However, it felt that the Supreme Court in *Vaughan* had expressly rejected the recovery of counsel fees on the basis of unconscionable behavior by the shipowner.[26] The court admitted that the Supreme Court did refer to callous, willful and persistent behavior, and that the language of the *Vaughan* opinion was not clear, but defended its view in light of the policies and authority upon which the decision rested.[27]

[25] 223 F. Supp. 79 (E.D. Va. 1963). This case was tried in the same district in which the *Vaughan* case was originally tried and to which it was remanded.

[26] 223 F. Supp. at 82.

[27] The court placed heavy reliance on Sims v. United States of America War Shipping Administration, 186 F.2d 972 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951), in which consequential damages were included in a recovery for maintenance and cure. In *Sims* the shipowner's good faith did not save him from liability; the court drawing an analogy to tort law in which

> a wrongdoer hurts another in an accident but fails to provide medical care or to alleviate the harm honestly thinking that (1) he was not himself negligent or (2) the victim was contributorily negligent. If the trier of facts disagrees with the actor on these conclusions, the defendant is liable for full damages suffered, although some of them could have been mitigated by prompt action of his part.

Id. at 974, 975.

However, in *Sims* the consequential damages from the withholding of the maintenance and cure were physical as a prolongation of the seaman's illness and no mention was made of monetary damages in the form of counsel fees. It should be noted that the Supreme Court in *Vaughan* did not cite the *Sims* opinion or use the phrase 'consequential damages.' Nevertheless, the *Jordan* court felt that counsel fees had been brought within the sphere of consequential damages in maintenance and cure action. 223 F. Supp. at 83.

> Apparently the Supreme Court intended to put shipowners on notice that if, in any case, they saw fit to contest a claim for maintenance and cure, regardless of the reasonableness of the grounds upon which the refusal to pay is based, and if it was ultimately determined on the merits that maintenance and cure was indeed owing, then counsel fees should be paid as compensation for 'necessary expenses' incurred. In other words, attorney's fees have been made a routine element of damages to be paid any seaman who wins a contested maintenance and cure suit. Apparently this added and unusual onus is put on the shipowners' shoulders in maintenance and cure actions in an attempt to equalize the always poor and usually ignorant seaman with the powerful, wealthy, and well-informed shipping company which is better able to evaluate the legal merits of a claim and to pay the, to them, relatively small amounts usually involved in maintenance and cure actions.[28]

In the *Gore* case, the court did not require a finding of recalcitrance by the shipowners before counsel fees could be awarded.[29] There was, however, no express statement that the recovery of counsel fees was treated as an automatic obligation to be placed on a shipowner in any litigated maintenance and cure claim. In allowing the seaman to recover counsel fees in one of the actions, the court did not permit the shipowner to escape liability due to the fact that he in good faith believed that ultimate responsibility for the maintenance and cure rested with another shipowner.[30] Against another shipowner counsel fees were awarded with the statement that the shipowner failed to pay maintenance concurrently with the need.[31] In the discussion as to whether secondarily liable shipowners could recover from primarily liable shipowners counsel fees paid to the seaman, the court made a strong argument in favor of a liberal interpretation of *Vaughan*. Citing the *Jordan* opinion, the court said that "the awarding of counsel fees in all these cases is a corollary of the strong policy of the admiralty law favoring prompt payment

[28] *Id.* at 83.

[29] Gore v. Maritime Overseas Corp., 256 F. Supp. 104 (E.D. Pa. 1966).

[30] When a seaman leaves any ship after he has become disabled, the ship that he leaves is responsible for providing maintenance and cure. See, *e.g.*, GILMORE & BLACK, ADMIRALTY § 6-8, at 257 (1957); 1 NORRIS, SEAMAN § 568 (2d ed. 1962); ROBINSON, ADMIRALTY § 36, at 292 (1939).

[31] Gore v. Maritime Overseas Corp., 256 F. Supp. 104, 116 n.9 (E.D. Pa. 1966). The court did note that Public Health Service records clearly indicated the merits of the libellant's claim which could be construed to raise an inference of bad faith.

of maintenance claims."[32] Although there was evidence that ruled out any contention that the primarily liable shipowner was acting in bad faith, the court assessed counsel fees as damages under a policy of encouraging shipowners to pay maintenance claims rapidly, and discouraging the denial to seamen of just claims for long periods while competing shipowners, or a court, resolved the issue of ultimate responsibility.[33] Thus, this court seems to have adopted a very liberal position in favor of seamen in the awarding of counsel fees in maintenance and cure cases.

The Supreme Court has not yet clarified its position on this issue, but the liberal policy considerations lying behind the action for maintenance and cure[34] make it seem probable that it will adopt a rule similar to the language of the *Gore* opinion. There could conceivably be a dispute over a maintenance and cure claim where the shipowner acted with the highest equitable regard toward the seaman's rights, but the seaman failed to cooperate in an investigation of the merits of the claim. Thus, the obligation on the shipowner to pay counsel fees should not be absolute and automatic in any contested maintenance and cure action that the shipowner loses. In such a situation where the equities lie on the side of the shipowner in the parties' attempt to settle prior to the litigation, the shipowner should not be responsible for the seaman's counsel fees.[35]

GEORGE V. HANNA, III

[32] *Id.* at 125.
[33] *Id.* at 126.
[34] Vaughan v. Atkinson, 206 F. Supp. 575 (E.D. Va. 1962) (on remand).
[35] Allowing the recovery of counsel fees as damages has also raised other problems. For example, most courts speak of reasonable counsel fees. In *Vaughan*, on remand, the district court held that a fifty per cent contingent fee contract could not be approved. Vaughan v. Atkinson, 206 F. Supp. 575 (E.D. Va. 1962). Other courts have allowed fees of thirty-three and one-third per cent of the recovery. See Rowald v. Cargo Carriers, Inc., 243 F. Supp. 629 (E.D. Mo. 1965); Hurte v. Socony-Mobile Oil Co., 221 F. Supp. 885 (E.D. Mo. 1963). However, if counsel fees are to be considered damages, who should determine the reasonableness? Should a lawyer be permitted to set his own fee or should it be determined by a judge or jury? In allowing recovery for reasonable counsel fees in *Gore*, the court held that if counsel could not agree on the amount of fee then affidavits should be filed by each side with the court in support of their claims. The court would then make a determination. 256 F. Supp. at 127 n.32. In Burkert v. Weyerhaeuser S.S. Co., 350 F.2d 826 (9th Cir. 1965), the court directed an award of counsel fees incurred by seaman on his appeal in an amount the district court thought reasonable. Other problems may well arise if the policy of allowing counsel fees in maintenance and cure cases is extended to seamen's actions based on unseaworthiness. See BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-7 (1963).

Antitrust—Insurance—Compulsory Rating Bureaus

In *Allstate Ins. Co. v. Lanier*,[1] North Carolina's statutory scheme requiring all insurance companies selling automobile liability insurance to adhere to state rates initiated by a compulsory rating bureau was upheld.[2] Plaintiffs, five large insurance companies doing twenty-nine percent of the total business in North Carolina, argued that because the North Carolina statute restricted competition by prohibiting lower premium rates, the statute had been pre-empted by the Sherman Act[3] and the McCarran-Ferguson Act.[4]

In 1869 in *Paul v. Virginia*[5] the United States Supreme Court held that the business of insurance was not commerce and subsequent decisions were consistent with this holding. Thus, insurance was not subject to congressional control under the commerce clause and consequently, the states regulated and taxed the business.[6] But in *United States v. South-Eastern Underwriters Ass'n*,[7] where there was concerted action and an agreement which fixed rates and commissions of agents, boycotts to coerce non-members to join

[1] 361 F.2d 870 (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966).

[2] For the entire scheme, see N.C. GEN. STAT. §§ 58-246 to -248.8 (1965), as amended, N.C. GEN. STAT. § 58-248 (Supp. 1965). Specific provisions under attack in the principal case are N.C. GEN. STAT. § 58-247 (1965) (membership in a bureau a prerequisite to writing automobile liability insurance) and N.C. GEN. STAT. § 58-248.2 (1965) (forbidding issuance of rates not in conformity with rates made and filed by the rating bureau, but allowing for the charging of a higher rate if such rate is charged with the knowledge and written consent of both the insured and the Commissioner). Other significant sections are N.C. GEN. STAT. § 58-248 (Supp. 1965) (providing for approval or disapproval of the proposed rates from the compulsory bureau by the insurance commissioner within ninety days after submission) and N.C. GEN. STAT. § 20-309 (Supp. 1957) (requiring automobile liability insurance as a prerequisite to registration).

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

[4] 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1964).

[5] 75 U.S. (8 Wall.) 168 (1869). Later cases were New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913); Hooper v. California, 155 U.S. 648 (1895). See generally SAWYER, INSURANCE AS INTERSTATE COMMERCE (1945), [hereinafter cited as SAWYER]; Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937 (1944).

[6] Although in 1944 there was state statutory regulation of rate-making in two-thirds of the states, private rate-making was not really effectively controlled. Kimball & Boyce, *The Adequacy of State Insurance Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 546-52 (1958) [hereinafter cited as Kimball & Boyce]. See also SAWYER at 38-40.

[7] 322 U.S. 533 (1944).

S.E.U.A., and control of ninety per cent of fire and "allied" lines, the United States Supreme Court held that insurance was subject to federal control under the commerce clause, noting that: "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."[8] However, the court found a more flexible conception of federal-state relationship than was present in *Paul v. Virginia* because the federal regulation (the Sherman Act) did not exclude state regulation.[9] The court said: "The argument that the Sherman Act necessarily invalidates many states laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates."[10]

Nevertheless, many feared that the foundations of state regulatory and taxing systems had been shaken,[11] notwithstanding a statement to the contrary by Attorney General Biddle.[12] Specifically, insurance men feared that state regulation that permitted rate-making would be declared invalid because in conflict with the Sherman Act; and state officials feared the invalidity of taxes as a burden on interstate commerce.[13] This fear was ill-founded because *Gibbons v. Ogden*[14] had held that state regulation of interstate activities was not proscribed by the commerce clause standing alone, but only when Congress had acted pursuant to the commerce clause. But much confusion was evident about the status of insurance regulation and insurance companies pressed for congressional legislation that would exempt insurance from federal antitrust laws and authorize continued state regulation.

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[8] *Id.* at 553.

[9] See Note, 44 COLUM. L. REV. 772, 777 (1944).

[10] 322 U.S. at 562.

[11] See Note, 46 MINN. L. REV. 1088 (1962).

[12] 90 CONG. REC. A3359, A3360 (1944).

[13] See Kimball & Boyce at 553-54. For the specific reasons given by insurance people that state laws should remain effective, see Dirlam & Stelzer, *The Insurance Industry: A Case Study in the Workability of Regulated Competition*, 107 U. PA. L. REV. 199, 201-02 (1958) [hereinafter cited as Dirlam & Stelzer].

[14] 22 U.S. (9 Wheat.) 1 (1824). Later, the United States Supreme Court ruled that as long as Congress had not pre-empted a field, the states were free to regulate. Robertson v. California, 328 U.S. 440 (1946). The *Robertson* case upheld state regulation of unadmitted insurers and unlicensed agents. The court held that state power to regulate insurance did not depend on the McCarran-Ferguson Act.

To clarify matters and to insure the existence of state laws which regulate insurance, Congress passed the McCarran-Ferguson Act,[15] a compromise between those who wanted Congress explicitly to overrule the *South-Eastern* decision and those who felt that Congress and the states could adjust to the situation with appropriate legislation.[16] Clearly, the purpose of the act was to plot the boundaries between state and federal regulation of insurance.[17] Its stated purpose was that the "continued regulation and taxation by the several states of the business of insurance is in the public interest . . ."[18] and, therefore, insurance "shall be subject to the laws of the several states. . . ."[19] A three year moratorium was declared to enable the states to enact legislation regulating insurance.[20]

Sections 2(b) and 3(b) draw the boundary: the former provides that the "Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law";[21] the latter provides that "nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[22]

Section 3(b) appears to be the result of congressional fears that the practices revealed in *South-Eastern* would arise again, although clearly, the Sherman Act would already be applicable under the *South-Eastern* decision since no question of state regulation was present in that case. Justice Black, speaking for the court, said, in reference to existing state regulation: "No states authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged. . . ."[23] The language of section 3(b) appears to incorporate Black's language.

[15] See Note, 46 MINN. L. REV. 1088, 1090 (1962) citing 23 CHI.-KENT L. REV. 317 (1945) for a detailed history of the McCarran-Ferguson Act.

[16] See 91 CONG. REC. 1480-81 (1945).

[17] Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 85 (E.D.N.C. 1965).

[18] 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1964).

[19] 61 Stat. 448 (1947), 15 U.S.C. § 1012(a) (1964).

[20] 61 Stat. 448 (1947), 15 U.S.C. § 1013(a) (1964). United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956) held that the Sherman Act was applicable during the moratorium.

[21] 61 Stat. 448 (1947), 15 U.S.C. § 1012(b) (1964).

[22] 61 Stat. 448 (1947), 15 U.S.C. § 1013(b) (1964). There is no lack of precedent for this "exemption" from antitrust. For a listing of statutory exemptions from federal antitrust laws, see PHILLIPS, PERSPECTIVES ON ANTITRUST POLICY 301-11 (1965).

[23] 322 U.S. at 562.

Any attempt to apply the Sherman Act to the business of insurance must, therefore, be justified by the absence of state regulation or the existence of abuses enumerated in 3(b).

In the principal case the plaintiffs did not argue that the Sherman Act had been violated by North Carolina or that the state had not regulated the business of insurance, but that the North Carolina regulatory scheme had been pre-empted by section 3(b) of the McCarran-Ferguson Act. The reason for this argument is clear. In *Parker v. Brown* the United States Supreme Court said:

> We may assume for present purposes that the California prorate program, [the regulatory scheme in question], would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[24]

Specifically, this has been interpreted to mean that the Sherman Act does not apply to state regulation of insurance.[25] Thus, plaintiffs argued that *Parker* could be distinguished from the principal case in that, while in *Parker* there was an attempted *application* of antitrust laws to the state activity in question, here was a *pre-emption* of state law because of a violation of section 3(b) of the McCarran-Ferguson Act.[26] In other words, section 3(b) denotes a limitation on the *Parker v. Brown* doctrine by making the Sherman Act pre-eminent in areas of boycotts, coercions, intimidations, even where the state had regulated.

Whether there has been a pre-emption depends upon congressional intent. Specifically, plaintiffs argued that section 2(b) stand-

[24] 317 U.S. 341, 350, 352 (1943).

[25] See, *e.g.*, Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957), *aff'd mem.*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828 (1957); North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961 (E.D. Ark. 1949), *aff'd*, 181 F.2d 174 (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950); Insurance Co. of North America v. Insurance Comm'n, 237 Miss. 759, 116 So. 2d 224 (1959).

[26] (Emphasis added.) Plaintiffs further noted that the regulation in *Parker* actually conformed to the federal Agricultural Marketing Act of 1937 and the dispute was therefore between two federal statutes; thus, the case did not involve a federal-state conflict as is present in the principal case. Brief for Appellants, pp. 34-38, Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

ing alone would give states *carte blanche* to regulate without fear of federal antitrust application. But section 2(b) is limited by section 3(b) which asserts the supremacy of the Sherman Act where there is "coerced" restraint of trade, whether private or state, because unless this is so, the langauge of the act is redundant since antitrust legislation is already applicable under section 2(b) to the extent the state has not undertaken regulation. Thus, section 3(b) denotes something further, pre-emption of state laws which establish "coercion" in restraint of trade.[27] North Carolina contended that the two sections do not conflict; state regulation operates as a substitute for the Sherman Act, except that it is always applicable to private boycott, coercion, etc., not to "state coercion" because Congress did not intend to create a new area of Sherman Act application beyond *Parker v. Brown*.[28]

The court in the principal case rejected plaintiffs argument:

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[27] Evidences of this congressional intent are the following:

> I take it that the Senator is apprehensive lest a statute by a State attempting to give validity to a private agreement to regulate would be recognized under [*Parker v. Brown*] . . . I have no doubt in my own mind that no State . . . could give authority to violate the Sherman antitrust law.

91 CONG. REC. 1480 (1945).

> Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any Insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

H.R. REP. No. 143, 79th Cong., 1st Sess. 2 (1945).

Plaintiffs also point out that Congress did not establish compulsory rating bureaus for the District of Columbia. Brief for Appellants, pp. 26-27, Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966). For the general argument of the plaintiffs, see Bergson, *Regulation v. Competition*, 1956 INS. L.J 703, 706-07.

[28] Evidences of this congressional intent are the following: "The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials." 91 CONG. REC. 1479 (1945) (President Roosevelt writing to Senator Radcliffe, quoted by Senator Pepper).

> A state law relating to taxation, a law relating to regulation, for insurance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definition of monopoly be monopolistic, would be permitted under the pending bill; but if the State undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void. . . .

91 CONG. REC. 480-81 (1945) (remarks by Senator Ferguson). Thus, it appears that North Carolina makes no distinction between private and compulsory bureaus, arguing that Congress intended to allow the states this discretion, whether or not such later practice might actually be monopolistic.

> [W]e find no merit in the distinction suggested by appellants between the injunction sought in *Parker v. Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker v. Brown*, the North Carolina statutory plan is clearly valid.[29]

The court concluded that nothing in the McCarran-Ferguson Act or its history suggest a limitation of *Parker*, that there was no delegation of sovereign authority to a private group or authorization of violations of antitrust laws, and that the purpose of the McCarran-Ferguson Act was to give full support to then existing and future systems of regulation.

While the court is correct in holding *Parker* indistinguishable from the principal case to the extent that the result hoped to be reached in both was to make state regulation ineffective, it does not answer plaintiff's arguments. For example, the court referred to Senator Ferguson to the effect that a state could institute a rating bureau, but the question is not a rating bureau per se, but whether the state can have a compulsory rating bureau with standard rates allowing no deviation in view of section 3(b). Clearly, Congress intended to allow state established rating bureaus and to permit voluntary rate-making among insurance companies. Thus, under the act, insurance companies can voluntarily join together and agree upon rates as long as there is no section 3(b) violation and the state has regulated.[30] Further, subsequent to the McCarran-Ferguson Act a large number of the states enacted congressionally approved "all-industry" bills, which provided for non-compulsory rating bureaus subject to commissioner approval of rates.[31]

Perhaps the court was terse because of the more detailed holding of the district court, but the district court misunderstood plaintiffs argument, thinking the suit was an attempted application of antitrust laws to a state.[32] Actually, plaintiffs could have argued that

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[29] 361 F.2d at 872.

[30] See notes 27-28 *supra.*

[31] See Donovan, *Insurance—The Case in Favor of Existing Exemptions from the Antitrust Laws*, 20 FED. B.J. 56, 59-64 (1960). See generally ZOFFER, THE HISTORY OF AUTOMOBILE INSURANCE RATING (1959) [hereinafter cited as ZOFFER].

[32] The court said: "In effect, the plaintiffs insist the State has committed a violation of the Sherman Act by establishing such stringent controls upon the business of insurance as to foreclose competition. They insist the state

North Carolina had not come up to the level of regulation required to oust federal laws on the grounds that the regulation in question served no function except to permit anti-competitive activities under the guise of state control. However, this attack under section 2(b) would be difficult to prove and would be subject to the *Parker* malady already pointed out, i.e., the Sherman Act does not apply to activities which are controlled and regulated by the state.[33] Further, the courts have shown a reluctance to distinguish between effective and ineffective regulation.[34]

The principal case appears to be the first time this pre-emption argument has been made. The case is significant because it shows again the problems the courts have in applying the McCarran-Ferguson Act to situations where there is state regulation. The problem is two-fold: whether regulation under section 2(b) is sufficient to oust federal laws, and whether state regulation is still valid in light of the argued pre-emption of section 3(b). The implicit problem is whether state regulation that is ineffective or actually conducive to anti-competitive practices is sufficient to oust federal laws which attempt to maintain competition.

For example, in *North Little Rock Trans. Co. v. Casualty Reciprocal Exch.*[35] the court found that Arkansas had regulated within the meaning of the act so that federal antitrust laws were not applicable. Here, private rate-making was effective unless affirmatively disapproved of by the state insurance department. Although evidence of this practice does not of itself show that it was anti-competitive, plaintiffs were not permitted to present evidence that such was the effect of the regulation.[36] It has further been held that even if a monopoly existed otherwise, if a state regulated, then this was permissible. In *Miley v. John Hancock Mut. Life Ins. Co.*,[37] insurance companies and members of the State Employees' Group Insurance Commission joined and procured an award of an insur-

is *overcontrolling* the business of insurance." Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 83 (E.D.N.C. 1965).

[33] The United States as amicus curiae in the district court insisted the state had failed to come up to the standard of regulation required by the McCarran-Ferguson Act. *Id.* at 83. Clearly, this argument comes under section 2(b) of the act. The United States did not join this appeal.

[34] See text following.

[35] North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 181 F.2d 174 (8th Cir. 1950).

[36] For a criticism of this case, see Note, 60 YALE L.J. 160 (1951).

[37] 242 F.2d 758 (1st Cir. 1957).

ance contract for employees of Massachusetts. The result was that ninety-five percent of the insurance was allotted to these companies while the low bid was rejected by the state. Other decisions seem also to disregard the effects of state regulation and support the position taken by the court in the principal case.[38]

However, there may be some concern over this blanket analysis.[39] In *Califorina League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*[40] the court held that while an agreement among defendant companies to fix commission rates could not be attacked under section 2(b) because the state had regulated (i.e., allowed co-operation among insurance companies, but not an agreement to adhere), it was intimated by the court that the activity in question could be attacked under section 3(b). On subsequent amendment of the complaint, the same court held that such a regulation did not displace federal antitrust application, even if such a result did render the McCarran-Ferguson Act "meaningless" in the price fixing area.[41]

[38] In a situation analogous to the principal case, a compulsory rating bureau which allowed no deviation in rates was upheld. The court relied on *Parker* and applied the "principle" to the state activity. However, the argument presented in this case was not pre-emption, but was an attempted application of antitrust laws. Insurance Co. of North America v. Insurance Comm'n, 237 Miss. 759, 116 So. 2d 224 (1959). Where a state law proscribed unfair insurance advertising and authorized a scheme of enforcement, the United States Supreme Court has held that nothing in the McCarran-Ferguson Act supports the argument that there is a distinction between regulation and legislation; the legislation in question, even though the argument was made that the statute had not been crystallized into effective administrative procedures for application to the individual case, was sufficient regulation. F.T.C. v. National Cas. Co., 357 U.S. 560 (1958) (per curiam), *affirming* 245 F.2d 883 (6th Cir. 1957).

[39] In 1959 congressional hearings on this problem, seven senators of a subcommittee investingating antitrust matters concluded:

> It is clear that section 3(b) means that State regulation under . . . [the McCarran-Ferguson Act] may not abridge the protection from coercion, boycott, or intimidation afforded by the Sherman Act. The requirement of several State statutes for mandatory bureau membership substantially lessens competition and appears to be in conflict with the McCarran Act. . . . The McCarran Act can certainly not be viewed as justifying the acts of States in compelling all insurers to be members of rating bureaus or requiring that all rates be uniform by legislative fiat.

S. REP. 831, 87th Cong., 1st Sess., pp. 77 (1961). North Carolina's bureau was singled out as clearly reprehensible to the sentiments of the subcommittee and it was suggested by the subcommittee that the Attorney General bring an action to test the validity of the bureau.

[40] 175 F. Supp. 857 (N.D. Cal. 1959).

[41] California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 179 F. Supp. 65 (N.D. Cal. 1959).

Other cases have also shown concern over this problem and allowed antitrust application.[42]

Particularly relevant is the language the court used in *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*[43] where the court had found that the state had "regulated": "In passing the McCarran Act, Congress was attempting to return primary responsibility for insurance regulation to the states; only when a state has not acted, would federal legislation become effective. Section 3(b), on the other hand, was designed to exempt certain types of cases from this general pattern of deference to state regulation; where boycotts, or agreements to boycott were concerned, the federal policy expressed through the Sherman Act to be preeminent."[44]

Rate-making has the dual function of insuring adequacy of the insurance fund (to pay for the obligations of the insurance policy) and fairness of premium charges.[45] North Carolina's scheme fulfills the former by practically insuring solvency of the insurance companies. But the motorist perhaps pays higher for this protection than he should. It must be noted that this higher rate does not mean North Carolina rates are higher than rates in other states, but that rates perhaps could be lower in North Carolina if the compulsory aspect of the regulation were removed. It is common knowledge that rates in North Carolina are lower than surrounding states and the nation.[46] It may be argued that one factor causing this lower rate is the fact that jury verdicts of automobile negligence suits in North Carolina are lower than in states with more urban population. Moreover, the rates filed are based on pooled loss experience and the rate agreed upon is likely to protect the less efficient

[42] State regulation that attempted to regulate the insurance companies extraterritorial activities was considered insufficient to oust federal jurisdiction. FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960), *on remand*, 298 F.2d 820 (8th Cir. 1962). Even though regulation of title insurance was of the same nature as a particular provision of federal law, this was not sufficient to oust federal regulation which prevented one title company from purchasing stock of another title company in order to control the market. United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (D.C. Ill. 1965).

[43] 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1963).

[44] *Id.* at 844 (dictum).

[45] Kimball & Boyce at 545-46.

[46] The national average for minimum 5/10/5 liability coverage was $69.70 and North Carolina's average was $50.50 in 1965. South Carolina's was $58.69 and Tennessee's was $49.92. Many states were well above the national average. North Carolina Ass'n of Ins. Agents Memo, Feb. 1965, on file with the *North Carolina Law Review*.

member.[47] This means that the public cannot chose individual coverage, but must take "average" coverage through "average" prices or rates.

As far as the insurance companies themselves are concerned, they are severely limited in competing, even though they can make dividend returns and give better service.[48] And the argument has long been made that where there is strong state regulation as here, there is a tendency to have rates entangled with politics.[49] Nevertheless, in some ways the insurance companies collectively benefit. The scheme, which includes compulsory liability insurance, creates greater demand and this, in theory, promotes growth. But if there is greater demand, there are also factors generating greater cost—tendency toward more claims, the assigned risk plan,[50] and greater administrative costs because of complying with the regulations. Thus, if these factors are present, then all, not only some, of the insurance companies should share in this burden, i.e., by pooling possible losses with the requirement of strict uniformity in rates.[51]

Whether North Carolina's plan is of more benefit to the insured than to the insurer is not readily discernible, but it can safely be said that the plan does not effectively promote a significant level of competition. The best result would be one that protects the policyholder while allowing a healthy degree of competition among the

[47] See HENSLEY, COMPETITION, REGULATION AND THE PUBLIC INTEREST IN NONLIFE INSURANCE 87 (1962) [hereinafter cited as HENSLEY]. For the theory of rate-making, see ZOFFER 4-5. For the mechanics of rate-making, see CASUALTY ACTUARIAL SOCIETY, AUTOMOBILE INSURANCE RATE MAKING (1961).

[48] However, this form of competition is largely ineffective because dividend rates are uncertain, the buyer loses the use of his money during the period between premium and dividend, and the seller dislikes this method because it means increased costs. HENSLEY at 96. For an analysis of these ways of competing, see O'CONNOR & DAUER, AN ANALYSIS OF CURRENT COMPETITIVE AUTOMOBILE INSURANCE PLANS (1961).

[49] Although most states have financial responsibility laws, only three states have compulsory liability insurance as a prerequisite to registration: *Massachusetts*, MASS. ANN. LAWS ch. 90, § 1A (Supp. 1965) and MASS. ANN. LAWS ch. 90, §§ 34A-J (1954); *New York*, VEHICLE AND TRAFFIC LAW § 312 (1960); *North Carolina*, N.C. GEN. STAT. § 20-309 (Supp. 1957). Of these states, North Carolina and Massachusetts have laws requiring no deviations from set rates. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 82 (E.D.N.C. 1965). Texas also prohibits deviation. *Ibid.*

[50] N.C. GEN. STAT. § 20-276 (1953) provides for an "equitable apportionment among such insurance carriers." Assigned risk is the granting of insurance to those who otherwise would be uninsurable or whose rates would be higher.

[51] See S. REP. No. 831, 87th Cong., 1st Sess. 68 (1961).

insurers.[52] Alternatives to the plan in question seem closer to this goal. For example, if rate deviation were allowed, competition would be enhanced.[53] Solvency requirements could be established for entry into the market to insure enough reserves for policy coverage.[54] Assuming the argument that rating bureaus are necessary in the nonlife field is still maintainable (life insurance companies have legally established mortality tables to determine rates), the question is whether compulsory bureaus are necessary.[55] Most states have non-compulsory bureaus and allow for deviation in rates.[56] And if in fact such deviation still protects the solvency of the insurers and does indeed promote competition, then the argument for non-compulsory bureaus is persuasive.[57] Even in this situation, insurance companies are protected against rising costs because the market place would provide for higher rates. Of course, scrutiny of this higher price seems to be in the public interest. Whatever the alternatives may be, if insurance is to be regulated in regard to rates and solvency, this should not be support for broad exemptions from laws such as the Sherman Act which attempt to maintain competition.

Although the primary purpose of Congress was to return responsibility of insurance regulation to the states, the McCarran-Ferguson Act expresses a congressional intention to keep the Sherman Act applicable. The real question is whether the federal policy of competition promoted by the Sherman Act outweighs the policy of allowing wide discretion by the states in their choice of devices to regulate insurance. And viewed in this light, the court's decision is perhaps all that one could expect since courts have generally shown a

[52] See Michels, *Insurance—The Case Against Broad Exemptions From the Antitrust Laws*, 20 FED. B.J. 66, at 72-73 (1960); Dirlam & Stelzer at 211-15.

[53] The North Carolina plan did allow for deviation in rates until the law was amended in 1961 by the present N.C. GEN. STAT. § 58-248.2 (1965).

[54] See HENSLEY 38-66.

[55] *Contra*, Brook, *Public Interest and The Commissioners*, 15 LAW & CONTEMP. PROB. 606 (1950).

[56] The majority of states permit independent filing of rates; other states provide that companies must affiliate with a bureau and attempt to compete. See HENSLEY 97. The bureaus spoken of are usually national, such as the National Association of Independent Insurers, and provide the necessary information for the setting of rates. See ZOFFER 72-73. For a listing of states that have compulsory bureaus and standard rates set by the states in regard to all fields of insurance, see Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 82 (E.D.N.C. 1965).

[57] For an analysis of how effective rate-making is in the various states, see S. REP. No. 831, 87th Cong., 1st Sess. (1961).

reluctance to allow federal "interference" with state regulation, the underlying thought being that insurance is still basically a matter for local regulation. Since Congress created uncertainties under the act, Congress should remedy them.

WALLACE C. TYSER, JR.

Civil Procedure—Discovery of Liability Insurance

In the recent case of *Cook v. Welty*,[1] the United States District Court for the District of Columbia held that the plaintiff, in an action brought to recover damages for personal injuries arising out of an automobile accident, should be granted discovery by deposition or interrogatories of the existence and coverage of defendant's liability insurance.[2]

Federal courts, and state courts that have procedural rules similar to the Federal Rules of Civil Procedure are almost evenly divided on whether automobile liability insurance is discoverable. This problem is relevant in North Carolina because a new code of civil procedure has been proposed by the General Statutes Commission and will be considered by the 1967 North Carolina General Assembly.[3]

Deposition and discovery under the Federal Rules are encompassed by Rules 26 to 37.[4] Rule 26(b) delimits the scope of this discovery.[5] It provides:

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[1] 253 F. Supp. 875 (D.D.C. 1966).

[2] *Id.* at 878.

[3] GENERAL STATUTES COMMISSION, PROPOSED NORTH CAROLINA RULES OF CIVIL PROCEDURE (1966), [hereinafter cited as PROPOSED RULES.] The Proposed Rules are based on the Federal Rules of Civil Procedure and correspond numerically to rules of the Federal Rules.

[4] FED. R. CIV. P. 26-37.

[5] Whether discovery is by deposition (FED. R. CIV. P. 26, 30), interrogatories (FED. R. CIV. P. 33), or by production of documents and things for inspection, copying, or photographing (FED. R. CIV. P. 34), Rule 26(b) delimits the scope of examination both in the Federal Rules and the Proposed Rules for North Carolina. FED. R. CIV. P. 33-34 provide:

> [RULE 33] Interrogatories may relate to any matters which can be inquired into under Rule 26(b). . . .
>
> [RULE 34] the court . . . may . . . order any party to produce and permit the inspection and copying . . . of any . . . documents . . . which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b). . . .

Welty involved a motion to compel defendant to respond to questions asked while taking a deposition. It was stipulated by the parties that the issue would also arise if interrogatories covering the same subject matter had been served.

> **(b) Scope of Examination.** Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[6]

Almost all decisions, in determining whether liability insurance is within the scope of Rule 26(b), turn on whether insurance is

[6] FED. R. CIV. P. 26(b). PROPOSED RULE 26(b) is a copy of FEDERAL RULE 26(b) with the following addition:

> nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert.

FED. R. CIV. P. 30(b), (d), allow the court to limit or terminate discovery in order to protect the parties and deponents. They provide:

> (b). *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.
>
> (d). *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b).

relevant to the subject matter.[7] The courts that allow this discovery use three basic approaches.

(1) Some simply state that insurance is relevant to the subject matter.[8] They hold that the test of relevancy at discovery is not whether the information sought is admissible in evidence or is relevant to the precise issues in the case, but whether the information is relevant to the subject matter involved in the action.[9] In effect, these courts hold subject matter to include anything that will be helpful in preparing the case.[10]

However, this interpretation of relevancy does not seem valid in light of the history of Rule 26(b). In 1946, it was amended to add: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[11] In the Committee Note of 1946 to amended subdivision (b), it is stated:

> The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. . . . Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of the inquiry. . . .[12]

Thus, the test of relevancy to the subject matter contemplates discovery either to obtain evidence to be introduced at the trial, or to secure information as to where such evidence may be found. While liability insurance is admissible as evidence in certain situa-

[7] There are apparently no courts that consider whether insurance is privileged. Historically, there are three types of privilege recognized as a defense to discovery: privilege against self-incrimination, professional privilege, and privilege against making disclosures which would be injurious to the public interest. See Note, 34 NOTRE DAME LAW 78, 80 (1958). This Note expresses the view that in this historical context, automobile liability insurance is not privileged.

[8] See, *e.g.*, Hurley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965); Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961); Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951); Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948).

[9] *Ibid.*

[10] See, Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954).

[11] FED. R. CIV. P. 26(b).

[12] UNITED STATES SUPREME COURT, FEDERAL RULES OF CIVIL PROCEDURE, 65-6 (rev. ed. 1947).

tions,[13] it generally can neither be admitted as evidence nor be mentioned in front of a jury.[14]

Many courts hold that under the guidelines of the committee note above, insurance is irrelevant and not discoverable.[15] Although this conclusion seems valid, it is ignored by many courts. In *Welty*, for example, after recognizing that as a matter of strict logic insurance is irrelevant, the court dismissed this as too narrow a view.[16] In the case of *Orgel v. McCurdy*,[17] the court simply held that insurance may be generally relevant to the issues in the case.[18] However, it seems the valid test is whether it *is* relevant, not that perchance it *may* be relevant.[19]

(2) Other courts hold that insurance is relevant to the subject matter because plaintiff has a discoverable interest in the policy.[20] In *Maddox v. Grauman*,[21] the Court of Appeals of Kentucky held that the standard liability policy evidences a contract that inures to

[13] See, *e.g.*, Plyler v. Gordon, 25 F.R.D. 170 (D.N.J. 1960), where insurance could be used to show defendant was an independent contractor and thus not covered by the workman's compensation law; Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933), where a liability policy could be used to establish ownership of the vehicle; Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963); Isley v. Winfrey, 221 N.C. 33, 18 S.E.2d 702 (1942); Davis v. North Carolina Shipbuilding Co., 180 N.C. 74, 104 S.E. 82(1920).

[14] See, *e.g.*, Luttrell v. Hardin, 193 N.C. 266, 136 S.E. 726 (1927); Lylton v. Marion Mfg. Co., 157 N.C. 331, 72 S.E. 1055 (1911). While upholding the general rule that liability insurance is inadmissible as evidence, dicta in *Welty* states that perhaps the time has come to change this rule. 253 F. Supp. at 878-79. The rationale is that most states now have compulsory automobile insurance and most jurors will assume that defendant has insurance.

[15] See, Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Langlois v. Allen, 30 F.R.D. 67 (D. Conn. 1962); McDaniel v. Mayle, 30 F.R.D. 399 (N.D. Ohio 1962); Flynn v. Williams, 30 F.R.D. 66 (D. Conn. 1958); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952); Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964).

[16] 253 F. Supp. at 876-77.

[17] 8 F.R.D. 585 (S.D.N.Y. 1948).

[18] *Id.* at 586. While there is an indication that insurance was relevant in *Orgel* because there was a question of control of the vehicle, many cases use *Orgel* as authority where there is no issue of control. See, *e.g.*, Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951).

[19] DiPietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958).

[20] Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959); Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951); Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (Dist. Ct. App. 1960).

[21] 265 S.W.2d 939 (Ky. 1954).

the benefit of every person who may be negligently injured by the assured as completely as if such injured person had been named in the policy. This is because if there is judgment against the defendant and he does not pay, then plaintiff can go against the insurance company. The court concludes:

> If the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends? We believe it is. An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but is an agreement that embraces those whose person or property may be injured by the negligent act of the insured.[22]

In *Welty* the court extends this argument. It says that where liability insurance is present, the insurance carrier takes over the defense of the action and furnishes counsel to the defendant as well as investigating facilities. Thus, it concludes that insurance should be discoverable so that plaintiff can know his real foe.[23]

Those courts denying that there is a discoverable interest point out that before plaintiff has any rights against an insurance company, he must first recover a judgment against defendant. Therefore, as no enforceable claim accrues against the insurer until judgment against the insured becomes final, plaintiff has no rights under the policy at the discovery stage.[24]

In *Hardware Mut. Cas. Co. v. Hopkins*,[25] the New Hampshire Supreme Court held that plaintiff could examine the policies but that the policy amounts should be left off. This result would seem to answer the arguments of *Maddox* and *Welty*. A plaintiff would be able to determine his real foe as well as the rights and obligations of the insurer without reference to the amount of coverage provided.[26]

(3) The third ground on which courts hold insurance relevant and thus discoverable is that such revelation will lead to negotiations

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[22] *Id.* at 942.

[23] 253 F. Supp. at 877.

[24] See, Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951) (dissent). See also, 2 WILLISTON, CONTRACTS § 403 at 1091 (3d ed. 1959). The courts holding that there is a discoverable interest seem to overlook the highly technical nature of a true third party beneficiary contract.

[25] 105 N.H. 231, 196 A.2d 66 (1963).

[26] *Id.* at 234, 196 A.2d at 68.

and settlement.[27] *Welty* rests its decision predominantly on the need for settlement. The court explains that dockets are crowded and accidents on the increase. If a number of cases cannot be settled out of court, there will be congestion and the number of courts will have to be greatly increased. The court feels that information concerning liability insurance and its limits is conducive to fair negotiations. It states, for example, that in cases where injuries are great and insurance coverage low, the plaintiff might well be led to accept a smaller settlement than the extent of the injuries would otherwise warrant.[28] Other courts hold that the mandate of Rule 1 of the Federal Rules of Civil Procedure[29] requires a construction of Rule 26(b) that will lead to speedy determination of actions by way of settlement.[30]

Many courts, however, deny that the interest in settlements makes liability insurance relevant to the subject matter. They feel that the fact that courts are congested has no bearing on the fundamental rights of a defendant to have his day in court.[31] They also assert that the opposite of the large injury-low insurance argument is equally valid. If there is a small injury or plaintiff has a weak case, his discovery that defendant has high insurance limits might result in greater demands by the plaintiff.[32]

In answer to the argument that, in light of Rule 1, Rule 26(b) should encompass discovery of insurance, some argue that while compromise may be a by-product of discovery, the true goal of discovery and the Federal Rules is adjudication of the merits.[33]

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[27] See, Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966); Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961); Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961); Miller v. Harpster, 392 P.2d 21 (Ala. 1964).

[28] 253 F. Supp. at 877.

[29] "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

[30] *E.g.*, Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

[31] *E.g.*, Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).

[32] See, Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962), where the court also advances a test that if liability is admitted and damages are high, defendant should reveal his insurance. But if liability is hotly contested, he should not.

[33] See, Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), where Mr. Justice Black states that "if rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Id.* at 373. *Contra,* Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

In addition to these arguments, a few courts have held that relevation of defendant's insurance at discovery violates his fifth amendment constitutional rights.[34] The argument is that insurance is an asset of defendant and that if discovery is allowed, there is no rational basis to deny discovery as to all of defendant's assets before liability is established.[35] Thus, *Hillman v. Penny*,[36] a Tennessee federal case, expressed the fear that a groundless claim might become the vehicle for making full inquiry into all the confidential affairs of any defendant involved in an automobile accident.[37]

The arguments for relevancy of insurance as illustrated by *Welty* thus seem to be answered both by the purpose of discovery, *i.e.*, to get to the merits, and the limitations on discovery, *i.e.*, to matters of evidence or matters that may lead to evidence. Nevertheless, the courts are almost evenly divided on this question. As a number of courts seem to disregard the purpose and language of Rule 26(b), an amendment or a definitive decision by the United States Supreme Court would seem desirable in order to have uniformity throughout the federal system. When the North Carolina General Assembly considers Rule 26(b), it specifically should either include or exclude liability insurance from discovery.

EUGENE W. PURDOM

Civil Rights Act of 1964—Public Accommodations—Private Club Exemption

In *United States v. Northwest La. Restaurant Club*[1] a three-judge federal court held that the acts and practices of the members of defendant club constituted an unlawful deprivation of rights secured to Negro citizens for the free and equal use and enjoyment of public accommodations guaranteed by Title II of the Civil Rights

[34] Gallimore v. Dye, 21 F.R.D. 283, 287 (E.D. Ill. 1958). For a thorough discussion of the constitutional problem see Note, 34 NOTRE DAME LAW. 78 (1958).

[35] See, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952). *Contra*, Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951), which holds that a liability policy is not an asset but purchase protection for both compensatory and punitive damages.

[36] 29 F.R.D. 159 (E.D. Tenn. 1962).

[37] *Id.* at 161.

[1] 256 F. Supp. 151 (1966).

Act of 1964.[2] In an attempt to avail themselves of the exemption of "a private club or other establishment not in fact open to the public,"[3] the members, some one hundred restaurants, had formed a non-profit corporation named the Northwest Louisiana Restaurant Club. An action, seeking a permanent injunction against further discrimination, was brought by the Attorney General of the United States under 42 U.S.C. § 2000a-5.[4] The court held that the plaintiff was entitled to a permanent injunction as a matter of law.[5]

The Civil Rights Act of 1964 was the first federal government effort at prohibition of discrimination as to race since the Civil Rights Act of 1875.[6] The earlier act had been declared unconstitutional in *The Civil Rights Cases*[7] because it attempted to base on the fourteenth amendment its power to restrict discrimination by *individuals*. The new act has survived the test of constitutionality. Its provision for relief against *state action*[8] is supported by the long line of cases holding that Congress possesses such power under section five of the fourteenth amendment.[9] Its source of authority

[2] 78 Stat. 243, 42 U.S.C. §§ 2000a-2000a-6 (1964).

[3] 78 Stat. 243, 42 U.S.C. § 2000a(e) (1964).

[4] 78 Stat. 245, 42 U.S.C. § 2000a-5(a) (1964) provides that

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court. . . .

78 Stat. 245, 42 U.S.C. § 2000a-5(b) (1964) requires the Attorney General to certify that he feels that the case is of general public importance.

[5] 256 F. Supp. at 151.

[6] 18 Stat. 335 (1875).

[7] 109 U.S. 3 (1883). The public accommodations section of the act of 1875 was applicable to individual offenders and was not dependent upon state action, which led to its destruction. The Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873), had held that the purpose of the equal protection clause of the fourteenth amendment was to protect individuals from discrimination by state, not individual, action. Mr. Justice Harlan wrote a strong dissent in *The Civil Rights Cases*.

[8] 78 Stat. 243, 42 U.S.C. § 2000a(b) (1964) provides that each of the named establishments which serves the public is a place of public accommodation if it is "supported by state action."

[9] *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883). The scope of the authority within the prohibition of discrimination supported by state action is wide. Peripheral types of state activity have been brought within the sphere of state action. See Shelley v. Kraemer, 334 U.S. 1 (1948) (enforcement by state court of a covenant banning sale of real property to Negroes is state action); see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lessee of state-owned property is bound by the fourteenth

for the provision against discrimination by *individuals* is the commerce clause of the constitution.[10] Two cases[11] have supported its constitutionality on this theory.

The private establishment exemption provides that "the provisions of . . . [the act] shall not apply to a private club or other establishment not in fact open to the public. . . ."[12] The act does not articulate the reason for this exemption, but most certainly it must rest upon traditional notions of the rights of association and privacy.[13] Predictably, restaurants and other establishments, whose prior activities would constitute illegal discrimination under the new law, seized upon the exemption and attempted to create "private" clubs in order to avoid the necessity of compliance.[14] According

amendment in the conduct of a restaurant on that property); see Evans v. Newton, 382 U.S. 296 (1966) (city's control and maintenance of park devised to city for use of white people only subjects it to restraints of fourteenth amendment); see United States v. Guest, 383 U.S. 745 (1966) (arrest of Negroes by police after false reports that such Negroes had committed criminal acts would be sufficient state action.)

[10] U.S. CONST. art. I, § 8. 78 Stat. 243, 42 U.S.C. § 2000a(b) (1964) provides that each of the named establishments which serves the public is a place of public accommodation if its operations "affect commerce."

For arguments that this is an unconstitutional broadening of the commerce powers see Rice, *Federal Public-Accommodations Law: A Dissent*, 17 MERCER L. REV. 338 (1966); Note, 16 S.C.L. REV. 646 (1964).

[11] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inn, seventy-five per cent of whose customers traveled in interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant, "Ollie's Barbeque," purchased forty-six per cent of its meat from local supplier who had procured it from outside the state).

[12] 78 Stat. 243, 42 U.S.C. § 2000a(e) (1964). The section concludes with the statement that the club's facilities may not be restricted if they are available to patrons of "places of public accommodation" as defined in earlier subsections.

[13] In N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1957), the Court stated, "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." And in Griswold v. Connecticut, 381 U.S. 479, 483 (1965), "The first amendment has a penumbra where privacy is protected from governmental intrusion. . . . [W]e have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."

[14] The Wall Street Journal, July 22, 1964, p. 1, col. 4:

> Many Dixie businessmen, particularly in the big cities, are complying with the bill. But some are concerned about competition from the growing number of other establishments shifting to private operation in a last ditch effort to preserve racial barriers. Besides restaurant owners, others who have gone 'private' include proprietors of amusement parks, bowling alleys and at least one major hotel.

The Washington Post, Aug. 16, 1964, § A, p. 6, col. 4, related that the new Civil Rights Act brought a "sudden spate" of private clubs. Both of these newspaper articles refer to events within Mississippi.

to the court's decision, this is what was attempted by the members of the Northwest Louisiana Restaurant Club.

The test provided by the language of the statute for determination of the status of the alleged club is simply that it is "not in fact open to the public."[15] No detailed or sophisticated standards appear with which to attack the problem of just what is "in fact" open to the public.[16] Because of the short time since passage of the act and the resulting small amount of litigation under it, there has not yet been a great amount of judicial formulation of the tests that are to be applied.

Thus, as an aid in determination of the aspects to which the federal courts are likely to turn in forthcoming litigation, examination may be made of the following: the legislative history of the exemption, state court decisions rendered under state public accommodation laws, and the factors deemed significant in the principal case.

The legislative history of the private club exemption is limited almost entirely to the Senate discussion surrounding an amendment to the language in the proposed House of Representatives bill. The House version read, "bona fide private club."[17] The amendment changed this language to the way it now appears, *viz.* "not in fact open to the public."[18] The debate made it clear that this change was made so as to more accurately reflect the intent of Congress that the *motivation* for the establishment of the club is *not* to be the test; rather, the question is to be one of *fact* alone.[19] Thus it seems clear

[15] 78 Stat. 243, 42 U.S.C. 2000a(e) (1964).

[16] The Act lists in § 2000a(b) establishments which are "places of public accommodation." But as Professor Van Alstyne, writing on the Ohio law, points out, "[I]t is impossible to determine the scope of the private club exemption by listing *types* of facilities, for the legitimate exclusiveness of such clubs is more a function of their internal order than of the activity which they sponsor." Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 688 (1961).

[17] H.R. 7152, 88th Cong., 1st Sess. § 201(c) (1963).

[18] 78 Stat. 243, 42 U.S.C. 2000a(e) (1964).

[19] Senator Long, speaking for the amendment:

> Its purpose is to make clear that the test of whether a private club . . . is exempt from Title II relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence.

110 CONG. REC. 13697 (1964).

that according to the manifested intent of the legislators, a club could be formed primarily so as to exclude Negroes; yet if it is in fact private, it would not be covered by the act. Regardless of how one may or may not feel about this as a worthwhile attribute for an association, such would appear to be in keeping with the court-protected notions of privacy and right of association.[20]

Many states have passed their own public accommodations laws.[21] However, it has been the feeling of many that these laws have proven to be generally ineffective.[22] This ineffectiveness, plus the absence of such laws in some states, led to the belief that federal legislation was needed. Despite this ineffectiveness, state decisions rendered under these laws are valuable. They provide various factors that appear to have been significant in determining whether a particular establishment should be exempted as private:

(1) *Procedure for obtaining membership.* If the evidence is that white persons are admitted as members with very little formality, *e.g.*, by simply paying a small fee and "signing up," while Negroes have to present applications (which are seldom if ever approved), doubt is cast upon the contention that the club is in fact private.[23] Lack of genuine qualifications for membership, so that in practical effect, the only requisite is being white, together with little limitation as to number, has been deemed significant.[24]

(2) *Use of the club by persons other than members.* If on occasion persons (white) are admitted without any semblance of becom-

[20] See note 13 *supra.*

[21] Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia are apparently the only states that do not have any type of public accommodations law. For a list of the statutes, see Comment, *Public Accommodations Laws and the Private Club,* 54 GEO. L.J. 915 n.9 (1966).

[22] For the most part, this ineffectiveness rests upon two circumstances: strict construction and non-use of the state laws. See Comment, 19 U. MIAMI L. REV. 456, 465 (1965). See also District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953), where the Supreme Court had to decide whether or not the statute had been repealed by non-use. (Held that it had not been.)

For a general discussion of state public accommodation laws and the litigation surrounding their constitutionality see Caldwell, *State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs,* 40 WASH. L. REV. 841 (1965).

[23] See Lackey v. Sacoolas, 411 Pa. 235, 191 A.2d 395 (1963).

[24] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified,* 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd,* 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

ing members, it would appear unlikely that the club is private.[25] Of course, a genuine club permits its members to allow guests to use the facilities. But the "guest list" will hardly be permitted to become so great that the club is, in effect, open to the public.

(3) *Control arrangement; the existence or non-existence of a profit motive; character of the relationship among the members.* One writer[26] suggests the following types of questions: Are any of the policy decisions made by the members, or do they merely agree to decisions made by an independent manager, owner, or nucleus of members?[27] Is the club a nonprofit organization, perhaps collecting dues, or is it in practical essence a commercial enterprise, with profits going to the manager or owner personally? Do short-term membership cards functionally resemble tickets?[28] Is the principal sustaining element in the club the members' interest in and association with one another, or does the club exist primarily because of the common interest in the activity of its sponsors?[29] To what extent are those who use the facilities actually acquainted with one another?

In most of these state cases several of the above factors are discussed. One factor may seem to predominate, but the decisions are usually based upon a combination of two or more. Seldom is a broad or general rule stated. In at least one of the cited cases the reason for formation of the club was examined.[30] However, if legislative intent is to be given weight, motivation should be of no significance under the federal law.[31]

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[25] See Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290 (Ohio Ct. App. 1950).

[26] Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 689 (1961). The questions are posed in a discussion of the then new Ohio public accommodations law.

[27] See Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290 (Ohio Ct. App. 1950).

[28] See Evans v. Ross, 55 N.J. Super. 266, 150 A.2d 512, 4 RACE REL. L. REP. 355 (Camden County Ct. 1959), *aff'd*, 57 N.J. Super. 223, 154 A.2d 441, 4 RACE REL. L. REP. 1012 (Super. Ct. 1959), *cert. denied*, 31 N.J. 292, 157 A.2d 362, 5 RACE REL. L. REP. 209 (1959).

[29] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified*, 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957); Norman v. City Island Beach Co., 126 Misc. 335, 213 N.Y. Supp. 379 (1926).

[30] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified*, 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

[31] See note 19 *supra*.

Turning to the principal case, examination of the court's findings of fact reveals a reflection only of express dealing with some of the factors considered in state cases and apparently no dealing with legislative intent. Indeed, the court seems to have disregarded the intent of the legislators that motivation is not to be significant, as it found that the club "was organized and . . . exists for the purpose of avoiding the provisions of the Civil Rights Act of 1964."[32] It is easily understandable that a court would find it difficult to refrain from attaching significance to motivation. This is especially true where such a purpose is expressly manifested, as in this case where the organizers solicited members by representing that the club would provide a means for circumventing the act.[33] However, this should be avoided as a test of the "public" or "private" character of the club.

Procedure for obtaining membership, an important factor in the state cases, was evidently significant here. This is reflected in the court's finding that the members "offered and issued membership cards as a matter of course to any white customer without any requirements or conditions whatsoever. . . ."[34] A consideration of the use of the club by persons other than members was made when the court found that the members "served white customers without regard to whether they were members of the Northwest Louisiana Restaurant Club. . . ."[35] The nature of the interests of the members is not mentioned. However, it was found that prior to formation of the club,[36] the restaurants were businesses open to the public and that "the character of its trade and nature of its solicitation to the general public [of each member restaurant] had not changed by reason of its membership in the club."[37] Implicit in this finding is the fact that the only interest binding the members was avoidance of having to serve Negroes. Clearly, this is not the associational interest in one another that the act would seem to contemplate. Relevant here is the finding that the club conducted no general meetings

[32] 256 F. Supp. at 152.
[33] *Id.* at 153.
[34] *Id.* at 153.
[35] *Id.* at 153.
[36] The club was found to have been chartered as a corporation on June 30, 1964, only two days before the effective date of the act. *Id.* at 152.
[37] *Id.* at 153

after July, 1964.[38] Hardly can a club be a private association where the members do not meet together.

It seems apparent that *Northwest La. Restaurant Club* is a relatively "easy" case, and that the court had little trouble concluding that the members were not in such a relation that the private club exemption should be invoked to protect rights of private association. Such a protectable association did not exist. Because of the ease in deciding that this was indeed a "sham organization,"[39] the court here simply was not called upon for extensive articulation of the precise factors that led to the decision.

However, hard cases will come, and more judicial refinement of the factors considered will be necessary and welcomed. For example, what will be the decision in regard to the genuinely private club that grows larger and larger? Will the greater number of members, many of whom perhaps do not know one another, render the club so "open to the public" that it will cease to be exempted? How would a court hold on a facility, such as a golf course, which ordinarily constitutes a place of public accommodation, but operates as a "private" club, with associational interests existing among the members?[40]

ROBERT L. THOMPSON

Conflict of Laws—Departure from Lex Loci

In *Clark v. Clark*[1] the New Hampshire court applied its own law and allowed a guest passenger to sue her host for ordinary negligence rather than applying the stricter Vermont guest statute. The parties were both from New Hampshire; the automobile accident occurred in Vermont. The decision was a logical extension of that court's recent holdings in the area of conflicts law. Earlier in *Thompson v. Thompson*[2] the court abandoned its adherence to strict *lex loci delicti* which requires application of the law of the place of the wrong, overruled a long line of cases, and applied the

[38] *Id.* at 153.
[39] *Id.* at 153.
[40] Professor Van Alstyne suggests this problem. Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 688 (1961).

[1] ——N.H.——, 222 A.2d 205 (1966).
[2] 105 N.H. 86, 193 A.2d 439 (1963).

law of New Hampshire when deciding an interspousal tort suit. They followed *Thompson* with a consistent holding in *Johnson v. Johnson*[3] by refusing to invoke their own interspousal law when the litigants were from Massachusetts even though the accident occurred and suit was brought in New Hampshire. In a third case, *Dow v. Larrabee*,[4] the court held that Massachusetts law should decide the degree of care necessary in a suit between New Hampshire residents over an auto accident that occurred in Massachusetts. The holding was based upon a finding that Massachusetts was the state with the most significant relations.[5]

Clark v. Clark is the final and complete rejection of traditional *lex loci* application. The court candidly explained in *Clark* that in their recent holdings they had thought the "mechanical rule ought to be discarded, but unlike some of the other states . . . [they were] unwilling to abandon it completely until reasonably sure that a more satisfactory rule was available to take its place."[6] Now they are reasonably sure.

New Hampshire follows a small number of states[7] which have been persuaded to embark upon what North Carolina Justice Rodman terms an "uncharted sea."[8] The courses taken have varied considerably as the courts ventured from the relatively smooth waters of *lex loci delicti.*

For example, California in the first case[9] to "break the ice"[10] characterized a tort case as a question of "family relationship" which should be decided by the law of the domicile. Pennsylvania weighed the relative interests of the states involved in reaching its decision.[11] Similarly New York applied what it calls the "center of

[3] 107 N.H. 30, 216 A.2d 781 (1966).
[4] 107 N.H. 70, 217 A.2d 506 (1966).
[5] *Id.* at —, 217 A.2d at 508.
[6] ——N.H. at ——, 222 A.2d at 207.
[7] See, Lauritizen v. Larsen, 345 U.S. 571 (1953); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
[8] Shaw v. Lee, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963).
[9] Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).
[10] Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 134, 95 N.W.2d 814, 816 (1959). The court reviewed many cases but considered California as the first state to depart from *lex loci.*
[11] Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), 43 N.C.L. Rev. 586 (1965).

gravity" theory.[12] Wisconsin used a three step analysis and optimistically predicted a forth-coming "common law of conflicts that will be administered with uniformity as jurisdictions generally adopt this rule."[13]

Legal scholars have suggested lists of factors to be considered in decision making by courts that reject *lex loci.* An article by Professors Cheatham and Reese sets out nine factors,[14] and Professor Yotema's scheme embodies seventeen.[15] The New Hampshire court in the *Clark* case relied explicitly upon the five "choice-influencing considerations" as outlined and elaborated upon in a recent law review article by Professor Leflar.[16] Other authorities have written extensively on the question, invariably urging an abandonment of *lex loci delicti* in favor of a decision making process that would balance the policies and interests of the contact states.[17] The *Restatement (Second),* "Conflict of Laws," § 379 (Tent. Draft No. 9 1964) also reflects the current trend and reverses the *Restatement's* traditional position.[18]

In the face of and despite the overwhelming academic mandate

[12] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[13] Wilcox v. Wilcox, 26 Wis. 2d 617, 633, 133 N.W.2d 408, 416 (1965).

[14] Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952).

[15] Yotema, *The Objectives of Private International Law,* 35 CAN. B. REV. 721 (1957).

[16] Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966).

[17] DICEY, CONFLICTS OF LAWS (7th ed. 1958); STUMBERG, CONFLICTS OF LAWS (3d ed. 1963); Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility,* 58 HARV. L. REV. 361 (1944); Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952); Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L.J. 457 (1924); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1233 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155 (1947); Hill, *Governmental Interest and the Conflict of Laws,* 27 U. CHI. L. REV. 463 (1960); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws,* 33 YALE L.J. 736 (1924); Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1251 (1963); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959); Weintraup, *A Method for Solving Conflicts Problems: Torts,* 48 CORNELL L.Q. 215 (1963); Yntema, *The Hornbook Method and the Conflict of Laws,* 37 YALE L.J. 468 (1928).

[18] RESTATEMENT, CONFLICT OF LAWS § 378 (1934), applies the law of the place of the wrong in traditional *lex loci* fashion.

and growing acceptance by other courts, North Carolina continues to reject categorically all assaults upon *lex loci*.[19] The North Carolina court has been criticized in this *Review*[20] for refusing to alter its position but, as one case surveyor has observed, evidences no propensity for change.[21] Upon viewing the varied results of the courts which have been blown by "the winds of change"[22] and the result of *Clark v. Clark* in particular, it is not difficult to understand the court's reluctance. For example, the future decisions of the New Hampshire court will be based upon "the court's preference for what it regards as the sounder rule of law, as between the two competing ones."[23] Certainly, predictability and consistency are not lightly to be sacrificed to such open ended discretion.

However, it is clear that in a limited class of cases strict application of *lex loci* renders results which are not in keeping with established policy and preference as expressed in the substantive law of North Carolina. The most prominent examples are motor vehicle cases containing the following common elements: (1) All parties to the litigation are residents of the forum state. (2) The action results from a tort by one against the other. (3) The commission of the tort occurred while the parties were in transit, having left the forum state together and intending to return.

It is submitted that these cases should be excepted from the *lex loci delicti* doctrine and that this can be done without a substantial departure from the present rules. *Lex loci* was firmly entrenched in the law before the automobile afforded a cheap, fast, convenient, but not always safe means of interstate travel.[24] Thus, this factor was not a primary consideration when formulating tort law in the area of conflicts. That it has become a consideration demanding special treatment should not now be denied. This is especially true

[19] See, *e.g.*, Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Conrad v. Miller Motor Express, Inc., 265 N.C. 427, 144 S.E.2d 269 (1965); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Crow v. Ballard, 263 N.C. 475, 139 S.E.2d 624 (1965).

[20] See 43 N.C.L. REV. 586 (1965); 42 N.C.L. REV. 419 (1964).

[21] Wurfel, *Conflict of Laws, N. C. Case Law*, 43 N.C.L. REV. 895, 899 (1965).

[22] *Ibid.*

[23] —— N.H. at ——, 222 A.2d at 209.

[24] Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919); Harrison v. Atlantic Coast Line R.R., 168 N.C. 382, 84 S.E. 519 (1915); Hancock v. Telegraph Co., 142 N.C. 163, 55 S.E. 82 (1906). *Accord*, Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

when the cases are examined in the light of the applicable North Carolina law.

Two particular situations should be analyzed. First is where a North Carolina wife is denied an action against her husband in tort because the law of the place of the wrong would deny a wife such an action.[25] Second is where a North Carolina guest is required to show gross rather than ordinary negligence on the part of his North Carolina host under a guest statute of the *lex loci*.[26] In the circumstances above North Carolina substantive law would allow the wife to sue her husband[27] and require the guest only to prove ordinary negligence.[28] North Carolina's position is based in the first instance upon a statute favoring a wife,[29] and in the second upon a continued refusal either by statute or judicial decision to lower a host's standard of care to his guest.[30]

Those states which do forbid interspousal suits generally do so in order to encourage domestic harmony[31] while those requiring a greater degree of negligence on the part of the host seek to avoid collusive suits[32] and to discourage ingratitude on the part of the guest.[33] It is clear that these considerations do not influence the North Carolina court when deciding its own law.[34] Neither do they influence decisions when the court applies the law of another juris-

[25] Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

[26] Nix v. English, 254 N.C. 414, 119 S.E.2d 220 (1961); Baird v. Baird, 223 N.C. 730, 28 S.E.2d 225 (1943); Brumsey v. Mathias, 216 N.C. 743, 6 S.E.2d 495 (1940); Farfour v. Fahad, 214 N.C. 281, 199 S.E. 521 (1938); Wright v. Pettus, 209 N.C. 732, 184 S.E. 494 (1936); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933).

[27] N.C. GEN. STAT. § 52-4 (1965); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

[28] McGee v. Cox, 267 N.C. 314, 148 S.E.2d 132 (1966); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963); Nantz v. Nantz, 255 N.C. 357, 121 S.E.2d 561 (1961).

[29] See note 27 *supra*.

[30] See note 28 *supra*.

[31] Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws*, 15 U. PITT. L. REV. 397 (1954).

[32] Silver v. Silver, 280 U.S. 117, 123 (1929); Ehrenweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1960).

[33] This reflects the adage that a dog should not bite the hand that feeds it. See, *e.g.*, Chaplowe v. Powsner, 119 Conn. 188, 175 Atl. 470 (1934).

[34] See notes 27-28 *supra*.

diction since the question then is the law of the *loci* and not why it is applied.[35] Therefore, the court is precluded from examining the status of the litigants or the purpose of the foreign state's law.

The problem is clear. North Carolinians risk the loss of the liberal protection of their own law when they leave the state in an automobile either with their husband or as a guest passenger. This is true although they depart from the state in property licensed by the state, driven by a driver licensed by the state, covered with insurance issued in accordance with and paid for at a rate which contemplates liability in accordance with state law.[36] There is some support for a change in the area of conflicts which would allow a more equitable result in these cases.

In *Bogen v. Bogen*[37] the North Carolina court allowed an Ohio wife who was injured by the negligence of her husband on North Carolina roads to sue although she probably could not have maintained her action in Ohio.[38] The majority opinion did not depart from *lex loci* since North Carolina was both the *loci* and *fori*, but in applying its law the court used strong and poetic language to express a prejudice for allowing a wife to sue her husband.[39] They quoted an earlier opinion where the idea that husband and wife are one is ridiculed as "an inference drawn by courts in a barbarous age"[40] and where the court in reaffirming a belief in tort relief for a wife said: "Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of Ahaz.' Isaiah, 38:8"[41] It would seem that such strong belief in a wife's rights would be present sixty-six years later, but in conflicts cases we sometimes do indeed allow "the sun to go back."

[35] Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); *cf.* Lowe's North Wilkesboro Hardware, Inc., v. Fidelity Mut. Life Ins. Co., 319 F.2d 469 (4th Cir. 1963); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941).

[36] See, for discussion on insurance and suggestion that parties may purchase coverage with the liability imposed by the principal place of driving in mind, Ehrenweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1960).

[37] 219 N.C. 51, 12 S.E.2d 649 (1941).

[38] The court did not have to decide the correct Ohio Law. *Id.* at 54, 12 S.E.2d at 652.

[39] *Id.* at 53, 12 S.E.2d at 651.

[40] Crowell v. Crowell, 180 N.C. 516, 523, 105 S.E. 206, 210 (1920).

[41] *Id.* at 524, 105 S.E. at 210.

Ironically, the three dissenting judges in *Bogen*[42] would have abandoned the strict *lex loci* doctrine and refused the wife her action on the basis that the right to compensation is a chose in action which is personal property. Since the situs of personal property is the residence of the owner, they would have applied the law of the domicile. The dissent was somewhat ahead of its time, for the reasoning is similar to the "center of gravity" theory used by some courts today.[43]

It is also significant that in 1963 a federal court sitting in North Carolina, when faced with the problem of how the North Carolina court would decide a conflicts question, anticipated a "more flexible approach which would allow the court in each case to inquire which state has the most significant relationships. . . ."[44] A subsequent decision by the North Carolina Supreme Court makes it clear the federal court incorrectly stated the North Carolina law.[45] However, the implication is that a federal judge felt the court was on the threshold of, or at least amiable to, change.

The recent passage of the Uniform Commercial Code[46] and other statutes permit the courts to deviate from strict *lex loci.* The Code allows the parties to agree which state's law will apply in a contract situation when two jurisdictions are involved;[47] the Workman's Compensation Act provides compensation provisions for employees incidentally injured outside the state;[48] and the Insurance Act deems insurance contracts to have been made in this state and subject to its laws if property, lives or interests in the state are covered or if applications were taken in the state.[49]

The New Hampshire court states that North Carolina clings to *lex loci* but speculates that its "failure to reject it has resulted from an unwillingness to abandon established precedent before they were sure that a better rule was available, not to any belief that the old

[42] 219 N.C. at 55, 12 S.E.2d at 211.

[43] See, *e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[44] Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469, 473 (4th Cir. 1963).

[45] Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963); Wurfel, *Conflict of Laws, N.C. Case Law,* 43 N.C.L. REV. 895, 896 (1965).

[46] N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965). The Code becomes effective midnight, June 30, 1967.

[47] N.C. GEN. STAT. § 25-1-105 (1965).

[48] N.C. GEN. STAT. § 97-36 (1965).

[49] N.C. GEN. STAT. § 58-28 (1965).

rule was a good one."[50] Whether or not this is the North Carolina court's position, there is good argument for the court making express exceptions to protect legal rights now often nullified by crossing state boundaries. As suggested, the exception would be a very narrow one and apply only to residents injured in automobiles driven by a resident while in transit from and intended to return to the state of residence. This approach would allow the court to alleviate inequities and effect clear policies while awaiting a suitable alternative, if the court desires an alternative, to *lex loci delicti.* Such an approach would preserve predictability and consistency in North Carolina conflicts law.

PHILIP G. CARSON

Constitutional Law—Criminal Law—The "Mere Evidence" Rule—Applicability to the States

The mere evidence rule of *Gouled v. United States,*[1] that it is a violation of the fourth amendment prohibition against unreasonable search and seizure to take evidence from a defendant's premises unless that evidence is contraband, stolen property, or an instrumentality of a crime, was declared by the United States Supreme Court in 1921. Courts have found it difficult to apply the instrumentality exception, and the theory of the rule has been harshly criticized.[2] After the decision in *Mapp v. Ohio,*[3] which requires that evidence taken in violation of the fourth amendment be excluded in state trials, the question was certain to arise whether *Gouled* should be applied to the states.[4]

[50] —— N.H. at ——, 222 A.2d at 207.

[1] 255 U.S. 298 (1921).

[2] MAGUIRE, EVIDENCE OF GUILT § 5.04 (1957); 8 WIGMORE, EVIDENCE §§ 2184a, 2264 (McNaughton rev. ed. 1961).

[3] 367 U.S. 643 (1961).

[4] Although the mere evidence rule rests primarily on the fourth amendment, the peculiar origin of the rule in Boyd v. United States, 116 U.S. 616 (1886), gave rise to a theory that the rule rests on a dual basis of the fourth and fifth amendments. *Boyd* did not involve a search at all, but a court order to produce incriminating documents. In invalidating the order the United States Supreme Court first announced that a search for mere evidence was prohibited by the fourth amendment. Next the order was declared invalid under the fifth amendment prohibition against self-incrimination. Although a dissent insisted that the fifth amendment alone was the correct basis for the decision, a third justification for the holding was added:

In *Hayden v. Warden, Md. Penitentiary*[5] the Fourth Circuit Court of Appeals became the first federal court to consider this question. In *Hayden* the police entered a house in hot pursuit of an armed robber and found Hayden undressed in bed. During an otherwise lawful search of the house the police seized a cap found under a mattress and a jacket and trousers found in a washing machine. This clothing was admitted in evidence at the state trial as proof that Hayden was the man seen running from the scene of the robbery. In federal habeas corpus proceedings Hayden objected to the admission of the clothing in evidence on the grounds that it was mere evidence. The Fourth Circuit Court of Appeals agreed, and holding that the *Gouled* rule applies to the states, ordered a new trial.[6]

The United States Supreme Court has set no standard for determining how close the relationship between the evidence and the crime must be before that evidence can fairly be termed an instrumentality.[7] In *Marron v. United States*[8] the Court indicated that the exception should be broadly construed in favor of the prosecution when it held that receipts and utility bills seized in a raid were instrumentalities of a prohibition violation because they were part

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the order was equated with a search and the opinion concluded that any search for mere evidence was prohibited by the joint operation of the fifth and fourth amendments. The theory that one of the functions of the fourth amendment is to prevent self-incrimination fails to account for the fact that once the safeguards of oath, specificity, and particularity are met, the fourth amendment allows the use of force to exact evidence from a suspect's premises. If followed to a logical conclusion, the fifth amendment would allow no search whatsoever, or would at least protect the suspect from seizure of the most damaging evidence. But the effect of the rule is just the opposite. Because of the exceptions for contraband, stolen property, and instrumentalities, only the least incriminating evidence is protected. See State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965); Comment, 66 COLUM. L. REV. 355, 360-64 (1966); Comment, *A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 324-27 (1953), Comment, 31 YALE L.J. 518, 522 (1922). For some time after the decision in *Mapp* it was thought that the states would not be faced with the mere evidence rule because Mapp applies only the fourth amendment to the states. The fifth amendment was applied to the states as well in Malloy v. Hogan, 378 U.S. 1 (1964). See Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172, 180, (1964).

[5] 363 F.2d 647 (1966).

[6] Under N.C. GEN. STAT. § 15-25.2 (Supp. 1965) a search warrant may issue for anything "which may constitute evidence of a felony. . . ." The holding in *Hayden* invalidates this portion of the statute.

[7] Note, *Evidentiary Searches: The Rule and The Reason*, 54 GEO. L.J. 593, 614 (1966).

[8] 275 U.S. 192, 199 (1927).

of the outfit used by operators of a speakeasy. But five years later the Court favored a narrow construction in *United States v. Lefkowitz*[9] when similar items were held to be mere evidence. The court attempted to distinguish the cases by saying that the search in *Lefkowitz* was more extensive and exploratory,[10] but as far as the nature of the evidence is concerned, the cases cannot be reconciled.[11] Due to this lack of a standard the lower federal courts have found it difficult to apply the rule evenly and many inconsistencies have resulted. For example, in *United States v. Lerner*[12] an address book was held to be mere evidence. But in *Matthews v. Correa*[13] a similar address book was held to be an instrumentality.[14]

The property theory that is used to support the *Gouled* rule has been harshly criticized.[15] The basic idea of the rule is that property of the defendant may not be seized. Stolen property may be seized because it does not belong to the defendant. Contraband may be taken because the defendant's property rights in it have been voided by statute.[16] To justify seizure of instrumentalities the courts resort to the ancient deodand principle that things used in the commission of a crime are forfeited to the state.[17] To justify this property theory it is sometimes said that stolen property may be seized because the law wishes to return it to the owner and that contraband

[9] 285 U.S. 452 (1932).

[10] *Id.* at 465.

[11] LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 135-36 (1937).

[12] 100 F. Supp. 765 (N.D. Cal. 1951).

[13] 135 F.2d 534 (2d Cir. 1943).

[14] As to documentary items *compare* United States v. Loft on Sixth Floor of Bldg., 182 F. Supp. 322 (S.D.N.Y. 1960) (letters offering obscene materials for sale were mere evidence) *and* Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944) (letter containing evidence of criminal fraud held inadmissible) *and* Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933) (documents ordered returned after search) *with* United States v. Klaw, 227 F. Supp. 12 (S.D.N.Y. 1964) (advertising circular for obscene materials held to be instrumentality) *and* Landon v. United States Attorney, 82 F.2d 285 (2d Cir. 1936) (invoice used in smuggling operation was instrumentality) *and* Sayers v. United States, 2 F.2d 146 (9th Cir. 1924) (where business records were held to be instrumentalities). As to non-documentary items *compare* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief with evidence of sex crime not instrumentality) *with* United States v. Guido, 251 F.2d 1 (1958) (shoes worn in bank robbery were instrumentalities).

[15] Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 478 (1961).

[16] Boyd v. United States, 116 U.S. 616, 623 (1886).

[17] United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

is confiscated to prevent further use.[18] The forfeiture of instrumentalities cannot be so easily explained. Some instrumentalities such as weapons should be taken to prevent further use in crime or to protect the searching officers from attack.[19] But other instrumentalities such as a cancelled check, that cannot be used in crime again and are certainly not dangerous, may be seized as well.[20] Critics consider this property theory archaic and arbitrary. They argue that the primary purpose of search is to secure evidence[21] and that the police should not be hindered by ancient notions of forfeiture. The protection given to mere evidence is arbitrary because it defeats the policy of making evidence available to the police without balancing any comparable interest of the defendant against that policy.[22]

In defense of the rule it is said that it protects privacy by preventing an exploratory search or fishing expedition among the papers and effects of a suspect.[23] Learned Hand provided the most famous statement of this idea in *United States v. Poller*,[24] "it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his personal effects to secure evidence against him . . . limitations upon the fruit to be gathered tend to limit the guest itself." Critics argue, however, that in practice the rule does not protect privacy. During a search for contraband, stolen property or instrumentalities the police must typically go through a suspects's

[18] United States v. Boyette, 299 F.2d 92, 98 (1962).

[19] Palmer v. United States, 203 F.2d 66 (D.C. Cir. 1953).

[20] Zap v. United States, 328 U.S. 624 (1940).

[21] See Abel v. United States, 362 U.S. 217, 239 (1960). This is the attitude of the North Carolina Supreme Court. See State v. Bullard, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966) (dictum). *But see* Church v. State, 151 Fla. 24, 31, 9 So. 2d 164, 167 (1942).

[22] Comment, 66 COLUM. L. REV. 355, 360 (1966).

[23] Proponents of the rule also argue that it is required by the history of the fourth amendment. Citing Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1785), the English landmark case prohibiting the general warrant, they conclude that the first clause of the fourth amendment includes a prohibition against a search for mere evidence. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1921); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L. REV. 257-77 (1925). Later critics insist, however, that the fourth amendment must be read as a whole as a safeguard against general search and that no ban on seeking evidence per se is included in the prohibition against unreasonable search. Kamisar, *The Wiretapping-Eavedropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914 (1960). Comment, 66 COLUM. L. REV. 355, 363-67 (1966).

[24] United States v. Poller, 43 F.2d 911, 914 (1930).

papers and effects as thoroughly as they would if they were permitted to search for all relevant evidence.[25] If the police are going to find the evidence in any event, they should be allowed to use it.[26]

Since *Mapp*, defendants have urged acceptance of the rule in the state courts with increasing frequency, but the states have found the rule undesirable.[27] The California Supreme Court[28] has challenged the rule saying that although the United States Supreme Court has paid lip service to it, it has in fact been abrogated and cannot be considered a constitutional standard that should apply to the states under *Mapp*.[29] It is suggested that the rule, if it is to be retained at all, should be reduced to an expression of the Supreme Court's power to supervise the federal courts.[30] Other state courts have not

[25] Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 477 (1961). *But see* Ramsey, *Acquisition of Evidence by Search and Seizure*, 47 MICH. L. REV. 1137, 1155 (1930).

[26] The test of reasonableness under the circumstances offers protection from excessively extensive searches. Kremen v. United States, 353 U.S. 346 (1957); Harris v. United States, 331 U.S. 145 (1947). Although the test of reasonableness applies to persons, the mere evidence rule does not. See Schmerber v. California, 384 U.S. 757 (1966) where police were allowed to take a blood test over the objection of a suspected drunk driver. In Weeks v. United States, 232 U.S. 383, 392 (1913) (dictum) it was said that the state has always had the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime." If the type of evidence is immaterial in the search of a person, it would seem that any type of evidence should be available in the search of a dwelling.

[27] State v. Raymond, 142 N.W.2d 444 (Iowa 1966); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963); People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (1963). *Contra*, Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962).

[28] People v. Thayer, 47 Cal. Rptr. 780, 408 P.2d 108 (1966).

[29] The California Supreme Court in People v. Thayer, 47 Cal. Rptr. 780, 782, 408 P.2d 108, 110 (1966) relies on Ker v. California, 374 U.S. 23, 34 (1963) where it was said, "The States are not . . . precluded from demands of effective law enforcement in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . ." Thus the United States Supreme Court has indicated willingness to reinterpret older decisions which might be onerous to the states. The holding of *Ker*, that state police do not have to give the traditional knock and notice on the door of a dwelling place before beginning a search if giving notice will result in immediate danger that persons inside will destroy evidence, was not, however, a concession of the same magnitude that a re-evaluation of the mere evidence rule would be. There is only one United States Supreme Court case on the knock and notice requirement and it is based on a statute rather than the Constitution. Miller v. United States, 357 U.S. 301 (1958). The mere evidence rule has been directly applied three times by the United States Supreme Court in *Boyd*, *Gouled*, and *Lefkowitz* to suppress evidence and it is well represented in dicta. See *e.g.*, United States v. Rabinowitz, 339 U.S. 56, 64 (1950).

[30] The Gouled rule has been incorporated into FED. R. CRIM. P. 41(e).

been so direct but have attempted to avoid application of the rule through broad construction of the instrumentality exception. For example, in *State v. Chinn*[31] the Oregon Supreme Court recently held that bed linen, a camera, and film showing a photograph of the prosecutrix in the defendant's bedroom were instrumentalities of the crime of statutory rape.

In *Hayden* the Fourth Circuit Court of Appeals has rejected both these approaches. Although the court shows little enthusiasm for the rule it concludes that the holdings and dicta of the United States Supreme Court require application of the rule to the states.[32] The court also serves notice that it intends to enforce the rule strictly in favor of the defendant and will resist "stretching to the point of distortion the category of 'instrumentality of crime,' in order to achieve the admission in evidence of articles manifestly of evidential value only."[33]

It would nevertheless seem that practical difficulties from application of the rule in the states will outweigh its benefits. Although the rule does make a search somewhat less onerous for a suspect,[34] especially where papers are involved,[35] it has been suggested that

[31] 231 Ore. 259, 373 P.2d 392 (1962). See also Elder v. Board of Medical Examiners, 50 Cal. Rptr. 304, 318 (Dist. Ct. App. 1966), *but see* Cagle v. State, 147 Tex. Crim. 354, 180 S.W.2d 928 (1944).

[32] 363 F.2d at 651.

[33] There is room for doubt that the Fourth Circuit Court of Appeals will adhere to this narrow construction. A dissent in *Hayden*, 363 F.2d at 655, that the clothing should be considered instrumentalities of the crime of armed robbery because it was hidden in an attempt to perfect escape, is one of the most extreme applications of the rule that has been suggested in the federal reports. See United States v. Boyette, 299 F.2d 96 (4th Cir. 1962), where the court gave the instrumentality exception an extremely broad construction in holding that receipts on which a prostitute recorded the amounts received from customers were instrumentalities of a Mann Act violation.

[34] Hand was apparently motivated by this consideration in *Poller*. See note 24 *supra* and accompanying text. Kaplan, *supra* note 15, at 479 has suggested that this "pro tanto" protection of a suspect would be "just as well served by a restriction on search to the even-numbered days of the month."

[35] The New Jersey Supreme Court, noting that all United States Supreme Court cases applying the mere evidence rule to suppress evidence involved papers, has suggested that papers, and not effects, should be protected by the rule. State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965). Under this view papers deserve more protection than effects because of their thought content and closer relationship to privacy. Searches of papers can also be extensive. Alioto v. United States, 216 F. Supp. 48 (E.D. Wis. 1960). At times the mere evidence rule may be helpful in preventing excessive seizure of papers on the grounds that they throw light on the suspect's operations, but it would seem that this is a question of relevancy on which other and more appropriate rules are available. See United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y. 1943).

the state police are faced with a greater variety of situations than federal officers were evidence such as that in *Hayden* is necessary for a conviction.[36] It is further urged that if confessions are often to be denied the state police and greater emphasis on scientific investigation is desirable, the police in the states should be allowed maximum access to evidence in an otherwise lawful search.[37]

HENRY C. MCFADYEN, JR.

Constitutional Law—Illegal Search and Seizure—Injunction

Dissatisfied with the more common remedies for unlawful police searches, the United States Court of Appeals for the Fourth Circuit, in *Lankford v. Gelston*,[1] has added significant dimensions to the use of the federal injunction. The case arises from the efforts of Baltimore police to apprehend two Negroes suspected of killing a city policeman. Possessing arrest warrants, but no search warrants, the police entered more than three hundred homes within a period of nineteen days. The searches, largely based on anonymous tips, were conducted predominately in Negro neighborhoods. Plaintiffs, owners of the homes searched, sought a temporary restraining order in the federal district court against further searches. Jurisdiction was based on section 1983 of the Judicial Code.[2] Since the searches had ceased and the police commissioner had issued a general order[3] prohibiting further searches without probable cause, the court refused relief.[4]

The court of appeals, however, was unimpressed with the general order, primarily because it left determination of probable cause[5]

[36] Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327-32 (1962); Weinstein, *Local Responsibility for Improvement of Search and Seizure*, 34 ROCKY MT. L. REV. 150 (1962).

[37] Hayden v. Warden, Md. Penitentiary, 363 F.2d 647, 658 (1966).

[1] 364 F.2d 197 (4th Cir. 1966).

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).

[3] For a full text of the order see 240 F. Supp. at 555 n.2 (1965).

[4] Lankford v. Schmidt, 240 F. Supp. 550 (D. Md. 1965).

[5] See U.S. CONST. amend. IV.

to the individual officer and because it was not issued until the suspects had apparently left town.[6] Noting the lack of other remedies for the plaintiffs, the court reversed and ordered the district court to enjoin the Baltimore police "from conducting a search of any private house to effect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause."[7]

The *Lankford* case, then, offers an interesting basis for an analysis of federal injunctions limiting state police activity. It should be noted that when state remedies are sufficient to protect an individual's constitutional rights the federal courts are reluctant to interfere, primarily because of an interest in harmony between state and federal judicial systems.[8] In the recent Negro civil rights cases, however, the courts have ignored considerations of comity by either enjoining enforcement of segregation statutes[9] or simply declaring such statutes unconstitutional.[10] And even in the face of the federal anti-injunction statute,[11] at least one court has allowed an injunction after the commencement of a state criminal prosecution.[12]

In *Lankford,* no federal interference with a state judicial process was involved, and in such a situation the considerations of comity vanish. Moreover, if the conduct of the defendant is of a continuing nature, the court will usually grant an injunction,[13] and sometimes

[6] The suspects were later apprehended in New York.

[7] 364 F.2d at 206. The unanimous opinion was written by Judge Sobeloff.

[8] See Wolfe v. City of Albany, 189 F. Supp. 217 (M.D. Ga. 1960) where the court refused to grant an injunction against the enforcement of a handbill distribution statute which plaintiffs claimed abridged their right of freedom of speech. Relief was likewise denied in Douglas v. City of Jeannette, 319 U.S. 157 (1943) where the plaintiffs contended that a similar ordinance restricted their freedom of religion.

[9] Anderson v. City of Albany, 321 F.2d 649 (5th Cir. 1963).

[10] Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd* 352 U.S. 903 (1956).

[11] 28 U.S.C. § 2283 (1965) provides: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[12] United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied,* 369 U.S. 850 (1963).

[13] See, *e.g.,* Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948), where police were enjoined from attendance at union meetings, which conduct was held to violate the union's rights of free speech and freedom of assembly, and Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947) where the court enjoined police from further violations of plaintiff's right of due process after noting statements of the police that they intended to do so.

may even be held in error for abuse of discretion if it fails to do so.[14] But if the defendant's misconduct has ceased, as in *Lankford*, the court must rely on more subtle considerations before granting an injunction.

One of the most important of these considerations is the likelihood of resumption of the conduct of the defendant. If events beyond his control have caused the cessation, the question will be moot and an injunction unnecessary.[15] If the cessation is voluntary on the part of the defendant, the question still may be moot,[16] but voluntary cessation is not alone enough to prevent an injunction.[17] The power of the court to grant injunctive relief "survives discontinuance of the illegal conduct,"[18] and the defendant must show that "there is no reasonable expectation that the wrong will be repeated."[19] Moreover, courts have had to recognize that certain extraneous factors may influence a defendant's choice of future conduct. For example, a firmly intrenched state policy of segregation may make resumption of discrimination more likely and the need for an injunction more acute.[20] Related also to the defendant's con-

[14] In Henry v. Greenville Airport Comm'n, 284 F.2d 631 (4th Cir. 1960) the Fourth Circuit Court of Appeals held that since the plaintiff had proved by undisputed evidence that he was being denied constitutional rights by not being permitted to use airport waiting room facilities reserved for white passengers, the district court had no discretion to deny a preliminary injunction. See also Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956). In that case the district court was held to have abused its discretion by refusing to enjoin members of the board of education from enforcing a policy of racial segregation. See note 20 *infra* and accompanying text.

[15] United States v. Hamburg-American Co., 239 U.S. 466, 475-77 (1916). See also Standard Oil Co. v. United States, 283 U.S. 163, 182 (1931).

[16] The slightest likelihood of resumption of notorious conduct will keep the question from being moot. Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963). And the burden of the defendant to show mootness is a heavy one. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

[17] Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42-43 (1944); Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944); NLRB v. General Motors Corp., 179 F.2d 221 (2d Cir. 1950).

[18] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). See also Hecht Co. v. Bowles, 321 U.S. 321 (1944); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U.S. 202 (1916).

[19] United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945).

[20] Bailey v. Patterson, 323 F.2d 201, 205 (5th Cir. 1963). In other cases involving the civil rights of Negroes, dictum has indicated that plaintiffs are entitled to an injunction as a matter of right. In Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), the court stated:

> The single question which appears to divide us is what guidance, if any, we should now give the district court as to the future exercise of

duct is the nature and degree of harm that the conduct, if resumed, could inflict upon the plaintiff. If the harm seems irreparable, as in *Lankford*, an injunction will naturally be more likely to follow. Thus, courts view a defendant's conduct with considerable suspicion and require much more than mere voluntary cessation before refusing an injunction: "Police protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance that similar raids will not ensue when another aggravated crime occurs."[21]

Another important consideration concerning the advisability of an injunction is the availability to the plaintiff of other remedies. Other than the possibility of injunctive relief, a person is protected from violation of his constitutional rights by two devices—the exclusionary rule, whereby illegally obtained evidence is barred in a criminal proceeding, and the civil suit for damages. Neither of these remedies would have been useful in *Lankford*, as the court there pointed out.[22] Many excellent arguments have been made that the exclusionary rule is of little deterrent value in *any* situation,[23] and in *Lankford* the complete impotency of this remedy is even more obvious. The exclusionary rule applies only at trial, the illegal search having already occurred. Clearly if officers search a home without a warrant and find nothing incriminating, the rule is of no use at all to the victim of such a search.[24]

If the exclusionary rule has failed as a deterrent to unlawful invasions of privacy, civil remedies have fared little better. The right to sue a state official in federal court was clearly established

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its jurisdiction. That question, I think unfortunately, must apparently be cast in terms of whether or not there has been an 'abuse of discretion.' Certainly there has been none in the popular concept of that phrase. . . . But the law of Ohio and the Constitution of the United States simply left no room for the [school] Board's action, whatever motives the Board may have had. I think the appellants were clearly entitled to injunctive relief as a matter of right in this case.

228 F.2d at 859.

[21] 364 F.2d at 203. See also United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952).

[22] 364 F.2d at 202.

[23] The exclusionary rule places no personal sanction upon the policeman. Even if the average policeman understood the rule, seldom will he notice the final result of a violation. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 11-12 (1964).

[24] Irvine v. California, 237 U.S. 128, 136-137 (1954); Brinegar v. United States, 338 U.S. 160, 181-182 (1949) (Jackson, J., dissenting). See generally Comment, 47 NW. U.L. REV. 493 (1952).

by *Monroe v. Pape*.[25] The Supreme Court there held that section 1983 of the Civil Rights Act[26] provides such a civil remedy regardless of whether the plaintiff has exhausted other available remedies. The case, involving unlawful search and seizure, construed such police activity as under color of law for the purposes of section 1983.[27] Though the reasoning in *Monroe* has been criticized,[28] it is clear that section 1983 presently provides for both injunctive relief and money damages in a civil rights violation.[29] Nevertheless, the utility of a private suit against a policeman remains extremely doubtful. Even if a plaintiff should win a judgment, the personal assets of most policemen will be insufficient for compensation, and, in any event, the deterrent value of the suit for damages seems slight at best.[30]

Viewing the *Lankford* situation in light of the foregoing discussion, the decision appears sound. Conspicuously, however, the court ignored an important problem peculiar to the injunction, that is, the severe penalty for its violation. A non-complying policeman may face a heavy, arbitrary fine or even imprisonment. The deterrent effect is plain, but one must ask whether this remedy goes too far by compromising effective law enforcement. If the *Lankford* decision represents a trend toward wholesale injunctive relief in civil rights violations, it is possible to foresee situations in which policemen, for fear of a fine or imprisonment, will neglect conscientious law enforcement. Unfortunately, the court in *Lankford* was faced with only two choices. It could have either affirmed the lower court's

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[25] 365 U.S. 167 (1961).

[26] See note 2 *supra*.

[27] The *Monroe* decision was based on the reasoning in Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941). The court further held that a municipal corporation was *not* liable to a civil suit under § 1983.

[28] Justice Frankfurter's lengthy dissent in the *Monroe* case is consistent with his concurring opinion in Snowden v, Hughes, 321 U.S. 1, 16 (1944): "It [the jurisdictional problem] is not to be resolved by abstract considerations such as the fact that every officer who proports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

[29] Both of these remedies never appear to have been simultaneously awarded; however, there seems to be no good reason why this could not be done. See Note, 39 N.Y.U.L. REV. 839, 846-49 (1964).

[30] Mapp v. Ohio, 367 U.S. 643, 651-652 (1961); Irvine v. California, 347 U.S. 128, 137 (1954); Wolf v. Colorado, 338 U.S. 25, 41, 42-44 (1949) (Murphy, J. dissenting); Negrich v. Hohn, 246 F. Supp. 173, 182 (W.D. Pa. 1965). See generally Editorial Note, 12 How. L.J. 285 (1966).

decision, thereby denying any relief, or it could have granted an injunction, a regrettably negative sanction. Considering the seriousness of the police conduct, the choice of the latter seems justified.

The point to be noted, however, is not whether the decision is right or wrong. The real importance of this case is the fact that it illustrates the disturbing lack of an adequate solution to the problem of police-community relations. The recent riots in several large American cities underscore the need for such a solution.[31] The court in *Lankford* felt that an injunction restricting police behavior would solve the problem.[32] Perhaps the court was right in this particular case, but it must be remembered that the wisdom of judicial control of the police function has already been questioned; furthermore, an injunction is only granted *after* an individual's rights have been violated, and even then it is very limited in scope.

What is lacking is a positive, constructive answer to the problem. Rather than subsequent censorship by the courts of police decisions, perhaps the answer lies in increasing judicial responsibility in the law enforcement process itself.[33] Others have suggested legislative action in this area,[34] while some feel that civilian participation in the police function may be the answer.[35] Whatever action is ulti-

[31] One writer attributes the present difficulties with the police function to four major modern developments: (1) urbanization, (2) recent Supreme Court civil rights decisions, (3) mass migration of Negroes to Northern cities, and (4) the civil rights movement. Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47 (1965).

[32] "The sense of impending crisis in police-community relations persists, and nothing would so directly ameliorate it as a judicial decree forbidding the practices complained of." 364 F.2d at 204.

[33] Greater fairness in law enforcement practices may result by requiring that a judge, rather than an ordinary magistrate, should determine whether arrest or search warrants should issue. See LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

[34] "If legislatures should enact their own ideas of what is reasonable in the way of search and seizure, would the Supreme Court insist that it has the exclusive right of definition, and declare the statutes invalid? . . . I can only venture a guess that the Court would not invalidate such legislation. . . ." Waite, *Whose Rules? The Problem of Improper Police Methods*, 48 A.B.A.J. 1057, 1058 (1962). The writer is a former Professor of Law at the University of Michigan and was a member of the Supreme Court's advisory committee on the rules of criminal procedure.

[35] The Civilian Review Board, a controversial method of regulating police conduct, has been adopted in a few American cities. It is interesting to note that in the November 8, 1966 General Election, the residents of New York City overwhelmingly voted against that city's existing Civilian Review Board. For a further discussion of such independent review bodies see Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

mately taken to eliminate police-community hostility, it is important that it be taken now. Otherwise, the future may offer an increasing number of cases like *Lankford v. Gelston.*

D. J. JONES, JR.

Constitutional Law—Power of Legislature to Disqualify Members-Elect

Julian Bond, representative-elect to the Georgia General Assembly, was not allowed to take the oath of office on the first day of the session. Challenges to his qualifications were referred to a special committee, that held hearings and recommended that he not be seated. The House approved the recommendation and denied Bond his seat. In *Bond v. Floyd*,[1] Bond and two members of his constituency sought to enjoin the exclusion. The three-judge District Court, one judge dissenting, upheld the House action as a reasonable exercise of its power to judge the qualifications of its members. It found the House justified in declaring the strong anti-war statement of the Student Nonviolent Coordinating Committee, which Bond supported and expanded on,[2] repugnant to the oath required of House members to support the federal constitution. Thus, there was no denial of due process.

The dissent did not reach the federal constitutional issues. Construing the power of the House to judge the qualifications of its members as limited to the qualifications specifically mentioned in the state constitution,[3] it would hold the House action void as in violation of that constitution. The majority thought this a "restrictive view, unfounded in recognized authority."[4] Both opinions turned to the federal Congress for legislative precedents.

[1] 251 F. Supp. 333 (N.D. Ga. 1966) *reversed*, 35 U.S.L. WEEK 4038 (U.S. Dec. 5, 1966). See note 75 *infra.*

[2] *Id.* at 336, 337. The SNCC statement opposed the war and declared support for men who would not respond to the draft, calling for a "freedom fight" at home as an alternative. Bond asserted that he fully supported the statement, and added that he was a pacifist who admired the courage of draft-card burners.

[3] GA. CONST. art. III, § VII, para. 1. This provision is substantially the same as U.S. CONST. art. 1, § 5. The qualifications mentioned in the Georgia Constitution are citizenship, residency, age, no former conviction of a crime of moral turpitude, and no holding of a civil or military office at the time of election.

[4] 251 F. Supp. at 340.

In the most recent debate on congressional power to disqualify members-elect, "the intent of the founding fathers" was seen by one senator as "convincing" support for a finding that the power is unlimited.[5] The history of the relevant constitutional provisions has been put to such use before, but that has been by no means its only service.[6] Another reading of the remarks invoked in both causes, set in the context of 1787, may yield a better appreciation of "the intent of the founding fathers."

The Pinckney draft of a federal constitution, presented on May 29, 1787, contained age, citizenship and residence requirements for members of the national legislature. It also provided that the House should be the judge of the "elections, returns and qualifications" of members, a provision which passed untouched to the final Constitution.[7] This draft constitution was seldom referred to in the convention, but provided a convenient skeleton for debate—and, more important, was submitted on July 26, along with the resolutions of the entire body, to the committee of detail.[8] In debate on qualifications, the delegates agreed on a minimum age of twenty-five for Representatives, though Mr. Wilson objected.[9] Delegate Mason later moved that the committee of detail include a clause setting minimum requirements of property and citizenship.[10] Mr. Dickinson "was against any recital of qualifications in the Constitution. It was impossible to make a complete one; and a partial one would, by implication, tie up the hands of the legislature from supplying the omissions."[11] Consistent with his earlier position, Wilson agreed, on the grounds that "odious and dangerous characters" might then be immune from disqualification.[12] Despite the Dickinson and Wilson views, occasionally quoted to show that Congress was not expected to be limited in disqualifying, the convention sent the Mason resolution to the committee.[13]

[5] 93 CONG. REC. 12 (1947). See also Bond v. Floyd, 251 F. Supp. 333, 341 (N.D. Ga. 1966).

[6] See, *e.g.*, 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 477 (1907) [hereinafter cited as HINDS].

[7] MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 129 (Elliot. ed. 1845).

[8] *Id.* at 375.

[9] *Id.* at 228.

[10] *Id.* at 370.

[11] *Id.* at 371.

[12] *Id.* at 373.

[13] *Id.* at 375

The proposed constitution, reported on August 6, contained age, citizenship and residence requirements as suggested by Pinckney.[14] Delegates were disappointed, however, by the treatment of the property qualification, embodied in proposed art. VI, § 2: "The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said legislature shall seem expedient."[15] James Madison voiced strong opposition to this grant of authority where no authority had been proposed: "The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate either, it can by degrees subvert the Constitution."[16]

When Gouverneur Morris moved to go further, and allow the legislature complete freedom to set qualifications by striking "with regard to property" from the section, Mr. Williamson thought, "This would surely never be admitted."[17] Reasserting the dangers of such power, Madison pointed to parliamentary abuses as "a lesson worthy of our attention." British legislators had regulated qualifications for selfish, political or religious ends, he said. These objections were evidently persuasive, for the Morris motion was defeated.[18] Then, before the final vote on art. VI, § 2, as reported, Mr. Wilson rose to plead again for a wider concession of power to Congress. He argued that the section be dropped because it "would constructively exclude every other power of regulating qualifications." This time Wilson was on the winning side, as the section was defeated.[19]

But whether that action meant what he said it should is another matter. His position seems feeble, in that the convention had already set, over his objections, citizenship and age qualifications, and a residence requirement that he could be expected to dislike for the same reasons. That art. VI, § 2, should have been proposed at all bears out Wilson's and Dickinson's claims that a list of qualifications would constructively exclude all others, leaving the legislature without authority in this area unless granted elsewhere in the instrument. The Morris amendment of the section would have come closest to

[14] *Id.* at 377.
[15] *Id.* at 377.
[16] *Id.* at 404.
[17] *Id.* at 404.
[18] *Id.* at 404.
[19] *Id.* at 404.

Wilson's wishes, but it was soundly defeated. Interpreters of this debate should find it as hard to deny Mr. Wilson's "inclusion of one is exclusion of all others" argument, as to agree that because the convention excluded one qualification, it meant to grant Congress power to include all others.

Madison's strict view of congressional power in this area, as may be expected, was promulgated in The Federalist. In discussing the qualifications specified, Madison suggests that they are exclusive: "Under these reasonable limitations, the door of this part of the federal government is open to men of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith."[20] More persuasive, perhaps, is Hamilton's full agreement with this construction, in a more definite statement: "The qualifications of the persons who may choose, or be chosen, as has been remarked upon on another occasion, are defined and fixed in the constitution, and are unalterable by the legislature."[21] Therefore, Hamilton concluded, there need be no fear that Congress might succeed in barring access to all but the rich; it has not the power.

Adherence to this theory has been somewhat erratic in Congress. In times of unusual stress—post-Civil War, World War I, and a period of national indignation at the marital habits of Mormons—legislators have seen other values as superior. But it is insufficient to discuss deviations as solely due to the pressure of events, for each generation sees its own times as turbulent, and finds new requirements for arbitrary action: the Vietnam dissenter today poses the same threat as did the unreconstructed rebel a century ago. A brief survey may reveal whether congressional practice in this area has established a different rule, based on policies unrecognized in 1787. If it has not, and if the policies then relied on remain predominant, perhaps it is time to reiterate the limits on legislative authority over qualifications.

It was early settled that the states could not add qualifications for members of Congress to those prescribed in the Constitution. In the contested election cases of *Barney v. McCreery*[22] in the

[20] THE FEDERALIST No. 52, at 249 (Hallowell ed. 1837).
[21] *Id.* No. 60, at 286.
[22] Clarke & H. Elec. Cas. 167 (1807).

House, and *Lyman Trumbull*[23] in the Senate, candidates were seated though they had not met state requirements. The Committee on Elections' report in the *McCreery* case emphasized that Congress is "sole judge" of qualifications.[24] State courts have since uniformly conceded Congress exclusive jurisdiction in this area.[25] Indeed, they have customarily adopted the maxim *expressio unius est exclusio alterius*, suggested by the committee in *McCreery* as the broader basis of its holding,[26] in construing their own constitutional provisions concerning qualifications.[27]

The Senate, though it had apparently once deviated from strict adherence to that hoary rule,[28] did not squarely face the question until 1862. Its answer then was in harmony with the Madisonian view and the *McCreery* understanding. When Senator Fessenden moved that Benjamin Stark's credentials be referred to the Committee on the Judiciary for an investigation of alleged disloyalty, he considered his action unprecedented.[29] The committee agreed, refusing to go beyond an examination of the credentials, and recommending that Stark be seated.[30] Senator Sumner argued that the Constitution, by requiring an oath of office, had made loyalty a necessary requirement.[31] This suggestion was sharply debated, and

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[23] Hupman, *Senate Election, Expulsion and Censure Cases*, S. Doc. No. 71, 87th Cong., 2d Sess. 21 (1962). [hereinafter cited as Hupman Elec. Cas.]

[24] 17 ANNALS OF CONG. 871 (1807) [1789-1824].

[25] See, *e.g.*, Shub v. Simpson, 196 Md. 177, 76 A.2d 332, *appeal dismissed*, 340 U.S. 881 (1950); Odegard v. Olson, 264 Minn. 439, 119 N.W.2d 717 (1963); State *ex rel.* Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946). *Compare* State *ex rel.* O'Sullivan v. Swanson, 127 Neb. 806, 257 N.W. 255 (1934), *with* State *ex rel.* Sundfor v. Thorson, 72 N.D. 246, 6 N.W.2d 89 (1942). *Contra*, 24 TEMP. L.Q. 484 (1951).

[26] 17 ANNALS OF CONG. 877 (1807) [1789-1824]; *accord*, Wood v. Peters, Mob. 79 (1889).

[27] Thomas v. Owens, 4 Md. 189 (1853); Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950); Black v. Trower, 79 Va. 123 (1884). In Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950), an additional oath was upheld as an effectuation of a loyalty requirement in the state constitution. As thus interpreted, the oath was found constitutional in Gerende v. Board of Supervisors, 341 U.S. 56 (1951). The court in Barker v. People, 3 Cow. 686 (N.Y. 1824), distinguished between an unconstitutional addition of qualifications and a constitutional disqualification as part of the punishment for certain crimes.

[28] John M. Niles, 1 HINDS § 441. Niles' sanity was investigated before he was seated. The dissent in the principal case notes that sanity is a qualification mentioned in the Georgia Constitution. 251 F. Supp. at 356.

[29] CONG. GLOBE, 37th Cong., 2d Sess. 183 (1862) [covering 1833-1873].

[30] S. REP. No. 11, 37th Cong., 2d Sess. (1862).

[31] CONG. GLOBE, 37th Cong., 2d Sess. 994 (1862) [covering 1833-1873]. The oath is required by U.S. CONST. art. VI.

the Senate defeated Sumner's resolution that Stark not be seated without prior investigation. The Senate then adopted the committee report and admitted Stark.[32]

The Act of July 2, 1862,[33] prescribing an oath of past loyalty, brought a change in congressional practice. As first passed by the Senate, the "iron-clad oath" would not have been required of Representatives, Senators, the Vice-President or the President,[34] and so would have avoided conflict with art. 1. But all exceptions save the President were eliminated in conference compromises with the House.[35] Its constitutionality was often attacked,[36] but never judicially determined. The Supreme Court, however, did strike down an act which extended the test oath requirement to lawyers in federal courts,[37] finding it an *ex post facto* law and bill of attainder.[38] The oath was repealed in 1884.[39]

While it was in effect, both houses excluded elected candidates for disloyalty, determining that the candidate could not swear truthfully.[40] It is unclear from the debates whether this procedure was considered warranted by the act; contradictory support was offered.[41] In one case, the House Committee on Elections paid lip service to the theory that enumerated qualifications are exclusive while disqualifying a candidate.[42] In the two cases in the House,

[32] CONG. GLOBE, 37th Cong., 2d Sess. 994 (1862) [covering 1833-1875]. This action was, however, taken "without prejudice to any subsequent proceeding in the case." The Senate thus agreed with its committee's position that though a member-elect could not be disqualified for prior disloyalty, he might be expelled. In 1796, The Senate had decided it had no jurisdiction to consider crimes alleged to have been committed by a member before election, 5 ANNALS OF CONG. 59, 60 (1796) [1789-1824]. It has never explicitly asserted such jurisdiction, though it did conduct hearings on such a matter in the case of Senator Gould, 68 CONG. REC. 43, 5914 (1926).

[33] Ch. 128, 12 Stat. 502 (1862), required the candidate to swear that he had never borne arms against, or voluntarily supported the enemies of, the United States.

[34] CONG. GLOBE, 37th Cong., 2d Sess. 2861, 2872 (1862) [covering 1833-1873].

[35] *Id.* at 3012.

[36] See, *e.g.*, McKee v. Young, 2 Bart. El. Cas. 422, 434 (1868) (minority report).

[37] Act of Jan. 24, 1865, ch. 20, 13 Stat. 424 (1865).

[38] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[39] Act of May 13, 1884, 23 Stat. 21, 5 U.S.C. § 16 (1965).

[40] Phillip F. Thomas, Hupman Elec. Cas. 40 (1868); Smith v. Brown, 2 Bart. El. Cas. 395 (1868); McKee v. Young, 2 Bart. El. Cas. 422 (1868).

[41] CONG. GLOBE, 40th Cong., 2d Sess. 320-30, 632-35, 653-62, 678-86, 1144-56, 1169-75, 1205-10, 1232-43, 1260-71 (1868) [covering 1833-1873]; 1 HINDS §§ 449, 451.

[42] In refusing to seat the candidate who received the second highest num-

strong minority reports were filed, attacking the procedure.[43] Three other House candidates during Reconstruction were investigated before being sworn; all were seated.[44] That the House felt constrained to relieve R. R. Butler of his "disability" under the oath before even administering it to him[45] indicates that the act, rather than a concept of inherent congressional power, was the basis for the Reconstruction disqualifications.

With the extraordinary exception of the *Whittemore* case,[46] the House, in 1870, returned to the practice of seating a member on a mere showing of *prima facie* right.[47] When a candidate was first challenged because of his polygamous marriages, this procedure was regarded as well established.[48] Subsequent to George Cannon's being seated, the Committee on Elections reported that it had no power to question his qualifications beyond these expressly stated in the Constitution, thus following (though not citing) the *Stark* case.[49] Reconstruction departures from these limits were distinguished as special inquiries which "did not relate in the remotest manner to the elections, returns and qualifications of the claimant under the Constitution."[50] The committee did not explain what power Congress had relied on in those cases, and the question was again avoided when, nine years later, Congress decided to exclude the same person for the same offense. It was emphasized that Cannon was a delegate from a territory, which Congress had power to regulate; no power

ber of votes, the Committee said: "This house can only be 'the judge of the election, returns, and qualifications of its members,' that is, can judge whether each member has been elected according to the laws of his State and possesses the qualifications *fixed by the Constitution.* Here its power begins and ends." Smith v. Brown, 2 Bart. El. Cas. 395, 404 (1868) (Emphasis added).

[43] *Id.* at 412, 434.

[44] Zeigler v. Rice, 2 Bart. El. Cas. 871 (1870); R. R. Butler, 2 Bart. El. Cas. 461 (1868); Symes v. Trimble, 2 Bart. El. Cas. 370 (1868).

[45] CONG. GLOBE, 40th Cong., 2d Sess. 3183 (1868) [covering 1833-1873].

[46] B. F. Whittemore resigned from the House when expulsion proceedings were begun against him; when he was re-elected to fill the vacancy thus created, the House refused to seat him. CONG. GLOBE, 41st Cong., 2d Sess. 4669-74 [covering 1833-1873]. Because of the unusual circumstances and the fact that debate was not permitted on the question, the Whittemore case has been found of no precedential value. 1 HINDS § 477; S. REP. No. 1010, pt. 2, 77th Cong., 2d Sess. 59 (1942) (minority report).

[47] Tucker v. Booker, 2 Bart. El. Cas. 772 (1870); Whittlesey v. McKenzie, 2 Bart. El. Cas. 746 (1870); 1 HINDS §§ 461, 465.

[48] 2 CONG. REC. 7, 8 (1873).

[49] 1 HINDS § 468.

[50] 1 HINDS § 495.

was claimed to exclude a Representative on such extra-constitutional grounds.[51]

However, the House ignored the limitations in these cases in 1899, when Utah, since admitted to statehood, elected another polygamist. It referred Brigham Robert's credentials to a special committee before seating him.[52] The committee's majority based its recommendation of exclusion on three propositions:[53] that the House had an "inherent" right existing "of necessity" to exclude lawbreakers; that there was precedent for the exercise of that right;[54] and that such action was authorized by a special statute dealing with polygamy.[55] The minority disagreed on every point, and recommended expulsion rather than exclusion.[56] But the majority pointed to the first *Cannon* case as evidence that a member once admitted under similar circumstances had not been expelled. It doubted whether Congress had the power to expel for conduct not connected with the office.[57] Despite the strong arguments of the minority, Roberts was excluded.[58]

Victor Berger, a former Representative, was challenged in 1919 under section three of the fourteenth amendment,[59] for his anti-war

[51] 13 CONG. REC. 3045-75 (1882).

[52] 33 CONG. REC. 53 (1899). The House thus bypassed its Committee on Election of President, Vice-President, and Representatives in Congress, which reported, on a different matter, that the House could not demand qualifications other than those specified. H.R. REP. No. 2307, 55th Cong., 3d Sess. (1899).

[53] 33 CONG. REC. 1073-84 (1900).

[54] The majority relied on the Act of July 2, 1862, and the *Niles, Thomas, Stark, Whittemore* and *Cannon* Cases. It ignored the constitutional challenges to the Act, and the first *Cannon* case, denying its precedential value. In addition, reference was made to several state cases, but these dealt with either qualifications fixed in the constitutions, or administrative, rather than legislative, offices. 1 HINDS § 477.

[55] The Edmunds Act, 22 Stat. 30 (1882), 48 U.S.C. § 1461 (1965), provides:

> That no polygamist . . . in any Territory, or other place over which the United States shall have exclusive jurisdiction . . . shall be eligible for election . . . to or be entitled to hold any office . . . in, under, or for any such Territory or place, or under the United States.

The Act was held constitutional under Congress' power to regulate the territories in Murphy v. Ramsey, 114 U.S. 15 (1885). But its applicability to a State seems questionable.

[56] 33 CONG. REC. 1085-1100 (1900). They found the concept of "inherent" legislative right negatived by the intent of the constitution's draftsmen, and distinguished cases cited by the majority.

[57] 33 CONG. REC. 1072-1084 (1900). See note 32 *supra*.

[58] 33 CONG. REC. 1217 (1900).

[59] No person shall be a Senator or Representative in Congress, or

editorials in a socialist newspaper. He was excluded, the committee finding that the amendment added a new qualification to the Constitution.[60] This case was distinguished in the principal case as one involving treason, one punishment for which is disqualification.[61] Berger, when re-elected, was excluded twice more.[62]

The House has not since disqualified a claimant on extra-constitutional grounds. The Senate has not done so since the *Thomas* case. Reed Smoot, another polygamist, was challenged in 1904, but he was allowed, and kept, his seat. The Senate overruled its committee by finding expulsion, not exclusion, the proper course of action in such a case.[63] Again in 1942, the Senate rejected a majority report and seated William Langer, accused of moral turpitude prior to his election.[64]

Theodore Bilbo was challenged on several grounds in 1947. Senator Taft thought the issue was whether Bilbo's actions "void the election,"[65] which would place the case among those involving Congress' express constitutional authority to judge elections. At any rate, though the majority in *Bond v. Floyd* rely on Bilbo's case as precedent,[66] no conclusive action was taken. The credentials were tabled when Bilbo's ill health rendered him unable to defend himself,[67] and his death mooted the question.

This review of contested-election cases involving unpopular or criminal acts committed prior to election reveals no development of congressional power to disqualify on these grounds. Rather, it seems to indicate that, in the few instances either house took such action, it did not rely primarily on its judicial function. And, after each such exercise, it ignored or distinguished the case and reaffirmed its

elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

[60] 58 CONG. REC. 8223 (1919).

[61] 251 F. Supp. at 355 (dissenting opinion). This conclusion seems justified by the debate, *e.g.*, 58 CONG. REC. 8237 (1919).

[62] 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 56 (1935).

[63] 41 CONG. REC. 3429 (1907).

[64] William Langer, Hupman Elec. Cas. 140 (1942).

[65] 93 CONG. REC. 17 (1947).

[66] 251 F. Supp. at 341.

[67] 93 CONG. REC. 109 (1947).

constitutional limitations. The most recent statement by a congressional committee on the question will illustrate its present status:

> The only rule presently in effect in the United States Senate which defines standards relating to the right of a member elected on the face of the returns whose right to a seat is challenged is derived from the Constitution of the United States and is as follows: [quoting art. I, § 5]. . . . There are no other statutory enactments, rules, standards of ethics, or laws undertaking to define the right of the Senate to deny a seat to any duly elected candidate. . . .
>
> . . . Since no standards exist, it would be grossly unfair now to formulate those standards "after the fact" for retroactive application. . . .[68]

The principal case, in upholding a broader exercise of power, quoted the Supreme Court in *Re Chapman* to the effect that a legislature "necessarily possesses the inherent power of self-protection."[69] But in that case, the Court construed a contempt statute as applicable only to those who refuse to cooperate in "matters within the jurisdiction of the two Houses of Congress,"[70] and cited an example where Congress had overstepped its limits.[71] Since then, the Court has plainly asserted that there are constitutional bounds beyond which the legislature may not venture in its exercise of the power of investigation.[72] In oral argument on appeal of the instant case, the Attorney-General of Georgia noted that *Bond v. Floyd* is a case of first impression before the Supreme Court. But as in the investigation cases, "the controversy . . . rests upon fundamental principles of the power of Congress and the limitations upon that power."[73] The Court has developed a practice in cases questioning the constitutionality of legislative investigations which is relevant here. Where the exercise of that power runs the risk of infringing protected rights, Congress and its committees will be held to a strict observance

[68] S. REP. No. 647, 82d Cong., 1st Sess. 2 (1951).
[69] 166 U.S. 661, 668 (1897).
[70] *Id.* at 667.
[71] Kilbourn v. Thompson, 103 U.S. 168 (1881), the first case to challenge Congress' power of compulsory process, found the subject matter of the inquiry involved beyond the reach of a legislative investigation.
[72] DeGregory v. Attorney General, 383 U.S. 825 (1966); United States v. Welden, 377 U.S. 95, 117 (1964) (Douglas, J., dissenting); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Watkins v. United States, 354 U.S. 178 (1957).
[73] Watkins v. United States, 354 U.S. 178, 182 (1957).

of their own rules.[74] Such procedure would seem peculiarly appropriate where the rule is imbedded in the Constitution itself. The Georgia Supreme Court has not interpreted this section of the state constitution, but the section is a copy of the federal constitutional provision. By adopting the interpretation of the Georgia Constitution urged by the dissent in the principal case, and supported by the history delineated above, the Supreme Court could follow its policy of avoiding, where possible, the federal issues involved.[75]

HUGH B. ROGERS, JR.

[74] Gojack v. United States, 384 U.S. 702 (1966); Yellin v. United States, 374 U.S. 109 (1963); United States v. Rumely, 345 U.S. 41 (1953); Christoffel v. United States, 338 U.S. 84 (1949).

[75] Immediately prior to printing of this note, the Supreme Court reversed on first amendment grounds. Bond v. Floyd, 35 U.S.L. WEEK 4038 (Dec. 5, 1966). Agreeing with the majority below on jurisdiction, a unanimous Court, per Chief Justice Warren, held that disqualification of Bond because of his statements violated his right of free expression. Bond could not have been convicted of inciting violation of the draft law, and he was willing to take the required oath to support the Constitution. The state may not demand from its legislators a higher standard of loyalty than it may constitutionally require of its citizens. Allowing a majority of his fellow-representatives to pass judgment on Bond's sincerity in swearing allegiance would have a chilling effect on dissent. The "manifest function" of the first amendment is to fan, not quench, the fires of debate. The Court concluded by stressing the benefits afforded by directing this encouragement to legislators as well as to citizens: the constituency is better informed, better able to judge its spokesmen, and better represented in government. Since it found the Georgia Legislature's action in conflict with the first amendment, the Court did not decide the other issues raised.

It seems clear that the Justices regarded this as an "easy" case when brought within the focus of the first amendment. To support its assertion that Bond's statements could not have been the basis for criminal conviction, the Court simply referred to three cases, declaring "no useful purpose would be served by discussing" them. 35 U.S.L. WEEK at 4043. The cases selected from out of the welter of free speech decisions of recent years were, as may be expected, chosen for their aptness and emphasis. Yates v. United States, 354 U.S. 298 (1957), reversed a Smith Act conviction obtained under instructions which did not distinguish advocacy of an abstract principle from incitement to action. So, in the principal case, the Court pointed out that Bond's attack on the Selective Service System fell short of encouragement to violate the law. *Yates* was one of the cases "explaining" the requirements for prosecution under the Smith Act, following Dennis v. United States, 341 U.S. 494 (1951), a case which had modified the "clear and present danger" test. Most observers thought that test had been removed from the judicial toolbox, *e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213. But in *Bond*, two apparently orthodox "clear and present danger" cases were cited: Terminiello v. Chicago, 337, U.S. 1 (1949) (reversing a breach of peace conviction), and Wood v. Georgia, 370 U.S. 375 (1962) (reversing a contempt conviction). Where the problem is determining the point at which speech can become criminal, the Court seems

Constitutional Law—Prisons—Confinement to Maximum Security as an Abridgment of First Amendment Rights

Throughout history courts have viewed the prisoner as one who by his crime forfeits all his individual rights.[1] This attitude, coupled with public and judicial endorsement of strict prison discipline, has led the judiciary to decline numerous invitations to pass upon the

to find utility remaining in the old test. *Terminiello's* aptness here lies in its assertion of the first amendment's design to invite, rather than squelch, dispute; *Wood* contained this statement: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." 370 U.S. at 395.

In rejecting Georgia's contention that it could apply stricter standards to legislators than to other citizens, the Court used a test more familiar to recent free speech litigants, the balancing of interests. While the state has a recognized interest in the legislators' sworn allegiance to the Constitution, "surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy." 35 U.S.L. WEEK at 4043. The countervailing interest of the public in having its representatives take positions on controversial issues is high. Therefore, reasoned the Court, the case may be decided by the "rationale" of New York Times v. Sullivan, 376 U.S. 254 (1964). That case had decided that a critic of official conduct should be protected by the first amendment from the imposition of an effectively punitive, though technically "civil," libel suit. Its statement of the "central meaning" of the first amendment has made it a touchstone for subsequent delineation of protected speech, *e.g.*, United States v. Johnson, 383 U.S. 169, 182 (1966), Lamont v. Postmaster General, 381 U.S. 301 (1965). *New York Times* had found the "lesson" of the first amendment in the attack on the Sedition Act of 1798, which had "carried the day in the court of history." 376 U.S. at 273, 276. Clearly, the Court in *Bond v. Floyd* found the action of the Georgia legislature a condemnable reminder of that infamous act.

Whether qualifications enumerated in a state or federal constitution should be regarded as exclusive, to prevent disqualifications on other grounds than speech, was not decided. The Court observed in a footnote that "Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views." 35 U.S.L. WEEK at 4043. But the Court did not draw, from the quotes selected, the conclusion urged above. Whether a legislator disqualified on grounds other than speech would have constitutional standing to challenge his exclusion in the federal courts, and whether, if presented with such a claim, the Court would follow the "rule" urged above, are questions which must await answer another day. That day could conceivably come early in 1967, if Representative Lionel Van Deerlin is successful in his attempt to deny Representative Adam Clayton Powell a seat in the Ninetieth Congress. See N. Y. Times, Dec. 1, 1966, p. 1, col. 1.

[1] "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."
Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

constitutional propriety of internal regulations imposed by prison administrators.[2] This reluctance has been especially prominent in the case of federal courts and state prisons.[3] Further, the courts have often expressed their conviction that the management and control of prisons is properly vested in executive agencies, and that they have no power to intervene in administrative matters.[4] However, a growing conviction on the part of the federal judiciary that a prisoner retains certain individual rights has led some courts to abandon this "hands off" doctrine.[5] Recent decisions have granted prisoners privileges to exercise such rights as prompt and timely access by mail to the courts,[6] communication with the outside world unimpaired by arbitrary prohibitions,[7] and subscription to a non-subversive Negro newspaper by a Negro inmate.[8]

The single individual right to freedom of religion has been the foundation for the overwhelming majority of inmate petitions, however, and the fight for protection of that freedom has been carried on almost exclusively by Black Muslim prisoners.[9] The Muslim

[2] For general discussion of judicial involvement in internal prison affairs and the rights of prisoners, see Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[3] *E.g.*, Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir. 1954); Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950).

[4] *E.g.*, United States v. Marchese, 341 F.2d 782 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Sutton v. Settle, 302 F.2d 286 (8th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955), *cert. denied*, 350 U.S. 971 (1956); Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953); Strowd v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); Dayton v. Hunter, 176 F.2d 108 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949).

[5] See Price v. Johnston, 334 U.S. 266 (1948).

[6] *Ex parte* Hull, 312 U.S. 546 (1941).

[7] Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953).

[8] Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).

[9] The list of cases involving Black Muslims attempting to assert their rights while incarcerated has grown rapidly in recent years. See Williford v. California, 352 F.2d 474 (9th Cir. 1965); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U. S. 932 (1964); Fulwood v. Clemmer, 295 F.2d 171

movement, which is familiar to most Americans because of its separatist social and economic policies and its promotion of militant Negro racial pride, has profoundly affected internal discipline in penal institutions by means of zealous efforts to protect its incarcerated members.[10] The movement should not be dismissed, however, as that of a group of militant racists adhering to unorthodox beliefs and practices. The Black Muslim faith has all the normal aspects of a religion—including a bible, ministers, temples and parochial schools.[11] As far as can be determined there has been no case in which a court has refused to recognize the movement as a legitimate religion; at least three courts have held expressly that Black Muslims do constitute a religious group.[12] The numerous petitions by Muslim prisoners have produced a significant body of decisions in which the courts have shown themselves willing to inquire into the possibility of granting relief for inmate grievances under the constitutional protection of freedom of religion. The basic proposition facing the judiciary in such cases is the delineation of boundaries between the exercise of individual religion and the pragmatic imposition of penal authority.

(D.C. Cir. 1961); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); Coleman v. District of Columbia Comm'rs, 234 F. Supp. 408 (E.D. Va. 1964); Sewell v. Kennedy, 222 F. Supp. 15 (E.D. Va. 1963); Dixon v. Duncan, 218 F. Supp. 157 (E.D. Va. 1963); Bolden v. Pegelow, 218 F. Supp. 152 (E.D. Va. 1963); *In re* Jones, 22 Cal. Rptr. 478, 372 P.2d 310 (1962); *In re* Ferguson, 12 Cal. Rptr. 753, 361 P.2d 417, *cert. denied*, 368 U.S. 864 (1961); Bryant v. Wilkins, 265 N.Y.S.2d 995 (App. Div. 1965), *cert. denied*, 383 U.S. 972 (1966); Blazic v. Fay, 251 N.Y.S.2d 494 (App. Div. 1964); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962). For commentary on Black Muslim cases see Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962); Comment, 32 GEO. WASH. L. REV. 1124 (1964).

[10] Prisoners believing in Islam have installed "kangaroo courts" within prison walls, Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964), demanded special dietary considerations during "Ramadan" (the month of fasting), Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), and kept special scrapbooks of Muslim materials, *In re* Ferguson, 12 Cal. Rptr. 753, 361 P.2d 417 (1961). Muslim prisoners at Leavenworth congregated in the recreation yard for instruction in judo and karate while other inmates were kept away by "sentries," Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965).

[11] LINCOLN, THE BLACK MUSLIMS IN AMERICA 125-28, 132 (1961). Muslims are also required to adopt a strict moral code (including puritanical sexual mores, dietary restrictions, and total abstinence from tobacco and alcohol) which is often beneficial to prison discipline. *Id.* at 80-83.

[12] Banks v. Havener, 234 F. Supp. 408 (E.D. Va. 1964); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Bryant v. Wilkins, 265 N.Y.S.2d 995 (App. Div. 1965).

In *Howard v. Smyth*[13] a Black Muslim inmate of the Virginia State Penitentiary sought release from the maximum security unit where he had been confined for approximately four years. During July and August of 1962 he had met with the prison chaplain and an assistant superintendent to ask for worship services for inmates who embraced the Muslim faith. Following these discussions he was called before the prison superintendent who heard his request and demanded the names of the prisoners for whom he spoke. Howard refused to give the names. He later explained that he feared disciplinary action against the Muslim inmates. The prison superintendent then summarily ordered him confined to the maximum security unit. Although hearings were customary in such cases, none was given Howard. The Fourth Circuit, reversing denial of Howard's petition by the District Court, held that while

> prison officials may and should be alert to exercise their legitimate authority to prevent breaches of discipline, even this acknowledged broad authority may not be exercised to discipline a prisoner who merely expresses for himself and others a desire to worship according to their religious dictates.[14]

Expressing its belief that petitioner was guilty of no misconduct, the court refused to countenance "the arbitrary imposition of such serious disciplinary action where the assertedly offensive conduct bears so close a relationship to First Amendment freedoms."[15]

The prison officials contested Howard's right to relief by means of a dual argument: (1) his confinement in maximum security was not "punishment," but merely "segregation"; and (2) he was not placed in security because of his religious beliefs. Acceptance of the first contention would have placed the administrators' decision within their acknowledged regulatory authority, thereby destroying the court's authority to interfere. The court hurdled this obstacle and reached the broader constitutional issue by looking beyond mere definitions and holding that the deprivations to which Howard was subjected by his change in status "cannot be treated as insubstantial."[16]

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[13] 365 F.2d 428 (4th Cir. 1966).
[14] *Id.* at 430.
[15] *Id.* at 431.
[16] *Id.* at 430. The court found that prisoners in the maximum security unit to which Howard was confined were not permitted to work and earn money; they were allowed only two meals a day, and were deprived of radio, television, and movie privileges. They did not have access to the library

The second half of the officials' argument was not dealt with so directly. By contending that Howard was placed in maximum security *only* because he refused to divulge the names of the other prisoners who desired Muslim services, the administrators presented the court with the task of constructing a proper foundation for First Amendment relief. The officials argued that the nature of the group represented by Howard was immaterial, because the existence of *any* cohesive groups of prisoners within the institution posed a threat to discipline.[17] In his testimony, the prison superintendent stated that he would have placed in maximum security *any* inmate who came before him requesting privileges for a group if that inmate refused to divulge the group's membership. He further said that this policy would apply equally to Protestant, Catholic or Jewish prisoners.[18] On the basis of this argument, the District Court had refused to find a violation of Howard's religious freedom. The Fourth Circuit thus faced the dilemma of accepting this argument, or bringing within the purview of the First Amendment Howard's refusal to divulge the names. The court followed neither course; rather, it slipped between the horns of the dilemma. The opinion acknowledges that the sole reason for Howard's confinement was his refusal to divulge the names, but continues:

> If a Protestant or Catholic or Jewish inmate had expressed a desire to worship with others of his faith, there can be little doubt that the prison officials would have been disposed to honor the request; and if for any reason this was thought impracticable, it can hardly be supposed that the mere making of the request or even the refusal to reveal the identity of other prisoners sharing in this concern would have led to punishment by years of confinement in the maximum security ward.[19]

This conclusion makes no attempt to equate Howard's actions with his religious beliefs, and it deals only peripherally with the

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and were not permitted to attend educational classes. Baths were restricted to once a week, as opposed to daily baths allowed other prisoners. In addition, the Parole Board declined to hear applications for parole from any prisoners confined to maximum security. *Id.* at 429-30.

[17] At least one court has associated this general fear of intra-institutional groups with the Black Muslims specifically. "Black Muslim inmates . . . tend to form themselves into cohesive, disciplined groups, taught to come to the defense of other Black Muslims and to demand equal punishment with a brother Muslim who might be disciplined." Jones v. Willingham, 248 F. Supp. 791, 793 (D. Kan. 1965).

[18] Record, pp. 24-25, 27.

[19] 365 F.2d at 428.

superintendent's arguments concerning the relationship between the refusal to give names and general prison discipline. The court simply bypasses these problems and concludes that the inviolability of a prisoner's religious attitudes demands that they be protected when the facts allow the conclusion that prison officials are in fact attempting to suppress them, even though they act under the guise of fair play. This interpretation is substantiated by the court's statement that petitioner "had been guilty of no misconduct," and by its final holding that "the only reasonable conclusion is that he is being arbitrarily punished."[20]

It was not absolutely necessary for this court to avoid an assessment of Howard's refusal to divulge the names of his fellow Muslims in order to grant the relief sought. In *Fulwood v. Clemmer*[21] a district court applied the protection of the eighth amendment to achieve a similar result. In that case, a Muslim prisoner had engaged in "racial preaching" which the court found was "such as to be offensive, insulting, and disturbing to white inmates and to non-Muslim negroes and to engender those feelings which tend to menace order."[22] Prison officials placed him in solitary confinement for two years. Relief was granted under the test formulated by Mr. Justice Douglas in *Robinson v. California*:[23] the imposition of a deprivation bearing no reasonable relation to the offense constitutes both a denial of due process and a cruel and unusual punishment within the ambit of the eighth amendment. Once the court in Howard had found that petitioner's special confinement constituted "punishment," the Douglas test could have been applied to grant relief even if the refusal to divulge names was construed as an offense against prison discipline. A holding based on this test, however, would have been decidedly less flexible than a decision grounded in the first amendment, because the eighth amendment lacks the scope necessary to encompass wide varieties of circumstances. But by its willingness to reach past secondary arguments and protect Howard's religious attitudes from infringements which it considered both substantial and arbitrary, the court in this case has demonstrated an unequivocal commitment to the emerging view that the most private of all consti-

[20] *Id.* at 428.
[21] 206 F. Supp. 370 (D.D.C. 1962).
[22] *Id.* at 378.
[23] 370 U.S. 660 (1962).

tutional rights must not be shut off even by the imposing barriers of prison walls.

H. HUGH STEVENS, JR.

Constitutional Law—The Right to a Bifurcated Trial

Congress, when passing the Federal Rules of Civil Procedure, recognized the likelihood that prejudice would result when certain issues were tried together and authorized the federal courts, in a civil suit, to order the separate trial of any issue to avoid that problem.[1] It would seem that the need to avoid prejudice in a criminal proceeding, where the life or liberty of the defendant is at stake, is even greater, but the Federal Rules of Criminal Procedure contain no comparable provision.[2]

The likelihood of this type of prejudice was so great in *Holmes v. United States*[3] that the defense counsel refused as a matter of trial tactics to raise the issue of the appellant's insanity at the time the crime was committed. The appellant, after being convicted, filed a motion under section 2255 of the Judicial Code[4] in the Federal District Court for the District of Columbia to have his sentence vacated alleging that his counsel rendered ineffective assistance because of his failure to assert the insanity defense.[5] Counsel testified that his experience led him to believe that such a defense would be a most "impractical approach or request to make of a jury," that a defense of insanity coupled with a defense on the merits would jeopardize both defenses, and that there would be great difficulty "without first admitting to the jury that the defendant Holmes was guilty of all counts before interjecting a defense of insanity."[6]

The appellate court found the "trial counsel's appraisal of the prejudicial effect of the insanity defense on the defense of not guilty was entirely reasonable," but that this did not mean that the insanity defense had to be abandoned. The court pointed out that the de-

[1] FED. R. CIV. P. 42(b).

[2] Such procedure would not be inconsistent with the Federal Rules of Criminal Procedure which authorize courts, "If no procedure is specifically prescribed by rule . . . [to] proceed in any lawful manner not inconsistent with these rules or any specific statute." FED. R. CRIM. P. 57(b).

[3] 363 F.2d 281 (D.C. Cir. 1966).

[4] 28 U.S.C. § 2255 (1965) (Statutory equivalent of habeas corpus).

[5] 363 F.2d at 281.

[6] *Id.* at 282.

fense counsel could have made a motion for a bifurcated trial and that the district court, to avoid the prejudice, could have submitted the issue of guilt to the jury before the introduction of the evidence bearing on the insanity issue. The court stated:

> Relevant considerations upon a request for bifurcation include the substantiality of Appellant's insanity defense and its prejudicial effect on other defenses. The court not only has a broad discretion considering bifurcation, but also prescribing its procedure . . . and even the impaneling of a second jury to hear the second stage if this is necessary to eliminate prejudice.[7]

The court denied retrospective collateral relief in this situation where the judgment had become final and bifurcation had not been requested at the trial level. It recognized, however, that the issue of prejudice was a serious one and could be averted in the future if the remedy of bifurcated trial were "adopted in the sound discretion of the trial court in the interest of justice."[8]

Although the United States Supreme Court has never considered the insanity situation presented in *Holmes*, it has recognized a due process argument where bifurcation was denied by a trial court in an analogous situation. In *Jackson v. Denno*[9] the court held that the New York procedure permitting the same jury to determine both the issue of guilt and also the voluntariness of a confession was unconstitutional, and that New York must provide the defendant with an "adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession" which meets the requirements of the due process clause of the fourteenth amendment.[10]

No United States Circuit Court of Appeals has ever required a bifurcated trial in a criminal case, but they have recognized the utility of the device. In *United States v. Curry*[11] the Court of Appeals for the Second Circuit recognized the power of the trial court to present the question of guilt to the jury and, after a verdict, to present to the same jury evidence pertaining to the sentence to be invoked.[12] In *Frady v. United States*[13] Judge McGowan, in a concurring opinion, advocated a bifurcated trial where a jury is to de-

[7] *Id.* at 283.
[8] *Id.* at 284.
[9] 378 U.S. 368 (1962).
[10] *Id.* at 394.
[11] 358 F.2d 904 (2d Cir. 1966).
[12] *Id.* at 915.
[13] 348 F.2d 84 (D.C. Cir. 1965) (reversed on other grounds).

cide guilt and is also given the responsibility of deciding between a life sentence and death.[14]

Only a few states have taken affirmative steps toward providing for a split verdict or bifurcated trial. California,[15] Connecticut,[16] New York[17] and Pennsylvania[18] have by statute provided for varied bifurcation procedures, but not in the insanity situation. These statutes provide for bifurcation on the issues of guilt and punishment and are limited to capital offenses, usually murder. Louisiana seems to be the only state that has adopted a bifurcation procedure and later abandoned it. The Louisiana procedure provided for two different juries whenever the insanity defense was urged in a capital case. The reason advanced for doing away with this procedure was that the smaller parishes had trouble supplying the necessary number of jurors.[19]

In so far as can be determined, no state appellate court has, without statutory authority, found occasion to reverse a trial court for denying a bifurcated trial. However, a rather complex situation has developed in Texas due to a court interpretation of a state statute which provides that a defendant who is insane at the time of trial cannot be tried until he has recovered from his mental illness.[20] The state courts interpreted this provision as requiring a separate and preliminary hearing on this issue.[21] Practical experience showed that the issue of the defendant's present insanity was usually involved with the issue of whether he was sane at the time the crime was committed and that a jury trying the issue of the defendant's present insanity might also render a verdict on his sanity at the time of the crime.[22] Article 521 of the Texas Code of Criminal Procedure still expressly provides that evidence of the defendant's insanity at the time of the crime is admissible under a plea of "not guilty." The result is that two different juries pass on the defendant's sanity and if either finds him insane at the time of the

[14] *Id.* at 91.
[15] CAL. PEN. CODE § 190.1.
[16] CONN. GEN. STAT. REV. § 53-10 (Supp. 1965).
[17] N.Y. PEN. LAW §§ 1045, 1045a (Supp. 1966).
[18] PA. STAT. ANN. tit. 18, § 4701 (1963).
[19] Bennett, *Louisiana Criminal Procedure—A Critical Appraisal* 14 LA. L. REV. 11 (1953).
[20] TEX. CODE CRIM. PROC. art. 46.02 (1965).
[21] Morgan v. State, 135 Tex. Crim. 76, 117 S.W.2d 76 (1938).
[22] *Id.* at 78, 177 S.W.2d at 77.

crime he is not guilty.[23] Most states have such a provision regarding the trial of a defendant who is insane at the time of trial, but it is not likely that any other state court would extend it to require a bifurcated trial as the Texas Courts did.

The issue of a bifurcated trial as presented in appellant's motion for collateral relief in *Holmes* can be expected to become a more frequent issue at the trial stage. A strong argument can be made that the denial of bifurcation in such a situation amounts to a denial of due process similar to the situation in regard to the voluntariness of confessions. This would seem to be especially true where the evidence bearing on the insanity issue operates practically as a confession to the commission of the act. For example, suppose a defendant is charged with murder and he urges the insanity defense and testifies that he had an irresistible impulse to kill the deceased or that he had heard auditory hallucinations which he believed to be the voice of God commanding him to kill the deceased victim. It would seem apparent that after a jury had found the defendant sane, this testimony could have no other effect than to convince the jury that he actually committed the crime. Even in situations where the evidence bearing on sanity has little or no relation to the subsequent issue of commission of the act, it would still seem to be highly prejudicial if the defense attempts to meet the burden of showing by expert testimony, voiced as hypothetical questions and answers, that the alleged insanity had a causal connection with the crime committed.

It is submitted that the authority to order a bifurcated trial should rest in the wide discretion of the trial court. But, as where similar discretionary functions are involved, the denial of such a motion, where there is substantial evidence of insanity and sufficient likelihood that the defendant will be prejudiced, should constitute reversible error readily rectified by the appellate courts.[24]

BILLY R. BARR

[23] Pena v. State, 167 Tex. Crim. 406, 320 S.W.2d 355 (1959). However, the court held that there was no right of appeal from the preliminary hearing.

[24] It should be noted that the argument for setting the judgment aside in *Holmes* was based on the supposition that defense counsel had rendered ineffective assistance. Where reversal is sought on the grounds that the trial judge abused his discretion in not allowing the motion for bifurcation would the District of Columbia Circuit Court require more certainty that prejudice would result from the denial and/or greater substantiality of evidence pertaining to insanity to warrant reversal?

Contempt of Court—Recent Developments

Historically, criminal contempt has been considered to be sui generis in that it is not a crime but is punishable by criminal sanctions.[1] However, in recent years a minority of the United States Supreme Court has comprehensively challenged the constitutionality of summary proceedings in criminal contempt. In *Green v. United States*[2] and *United States v. Barnett*[3] the dissenters, led by Justices Black and Douglas, argued that criminal contempts are crimes within the meaning of the Constitution and require a jury trial. In three recent cases the Supreme Court has shown a willingness to limit the extent of the contempt power but they have not, as yet, based their decisions on the Constitution.

In *Harris v. United States*[4] petitioner was granted immunity from prosecution by the district court and directed to answer the questions of a grand jury. After his refusal before the grand jury, and subsequently before the district court, the district judge, acting under the Federal Rules of Criminal Procedure Rule 42(a),[5] summarily adjudged Harris guilty of criminal contempt and sentenced him to one year in jail.

In a five-to-four decision the Supreme Court reversed and re-

[1] Bessette v. W.B. Conkey Co., 194 U.S. 324, 326 (1904).
[2] 356 U.S. 165 (1958).
[3] 376 U.S. 681 (1964).
[4] 382 U.S. 162 (1965).
[5] FED. R. CRIM. P. 42
(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or any order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of the judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

manded, and in doing so expressly overruled *Brown v. United States*.[6] The Court held that Harris was entitled to notice and hearing as provided for in Rule 42(b)[7] because summary disposition under Rule 42(a) is appropriate only in "unusual circumstances" occurring in the "actual presence of the court."

Although the Court held that the contempt was committed before the grand jury and, therefore, not in the "actual presence" of the Court,[8] the basis of the Court's decision seems to be the limitation of Rule 42(a) to "unusual circumstances." The Court argued that even if "we assume arguendo" that Rule 42(a) may at times reach testimonial episodes,[9] the actions of Harris did not necessitate summary punishment under Rule 42(a). The Court appears to be saying that even if the "actual presence" requirement is satisfied, the conduct of the contemnor must pose "an open threat to the orderly procedure of the court"[10] that necessitates "immediate penal vindication of the dignity of the court."[11] The facts in *Harris* do not indicate a serious threat to the court's orderly procedure and thus it was appropriate to afford him the procedural regularity and the procedural safeguards of Rule 42(b).

In *Cheff v. Schnackenberg*[12] petitioner was held in criminal contempt for having aided and abetted his company in violating a pendente lite order. The Court of Appeals for the Seventh Circuit, after denying the demand for a jury trial, found Cheff guilty of

[6] 359 U.S. 41 (1959). See note 8 *infra*.

[7] See note 5 *supra*.

[8] In Brown v. United States, 359 U.S. 41 (1959), under identical facts, the court had held that Rule 42(a) was the proper procedure because the grand jury is but an appendage of the court, dependent on the court to compel the testimony of witnesses. Pursuant to 18 U.S.C. § 401(1) (1966), federal courts have the power to punish criminal contempt committed in the "presence" of the court. Rule 42(a) requires "actual presence" for summary disposition. The requirement of "presence" under § 401(1) has been broadly construed and held applicable to misbehavior in the grand jury room, Carlson v. United States, 209 F.2d 209, 213 (1st Cir. 1954). Therefore, it seems that under § 401(1) the court in *Harris* had the power to punish the contemnor for his contemptuous act in the grand jury room. But since the court held that the real contempt was before the grand jury, even though the district court had the power to punish the contempt, the contemnor was entitled to the procedural regularity afforded in Rule 42(b).

[9] If Harris had refused to go before the grand jury and answer their questions, this would have been criminal contempt in the actual presence of the court and arguably could have been punished summarily.

[10] Cooke v. United States, 267 U.S. 517, 536 (1924).

[11] *Ibid.*

[12] 384 U.S. 373 (1966).

criminal contempt and imposed a six-month sentence. The Supreme Court granted certiorari limited to the question of whether, after denial of a demand for a jury trial, a six-month sentence is permissible under article III and the sixth amendment of the Constitution.

In a four-Justice ruling[13] the Court held that the sixth amendment did not require a jury trial in a proceeding that resulted only in a six-month sentence, the maximum permitted here for "petty offenses." However, in the interest of effective administration of the federal courts, the Court ruled that under their supervisory power[14] criminal contempt sentences exceeding six months may not be imposed unless there has been a jury trial or waiver thereof.[15]

Petitioner's chief contention was that criminal contempt proceedings are crimes within the meaning of article III, § 2[16] and the sixth amendment[17] regardless of whether they can be classified as petty offenses. In *United States v. Barnett*[18] the Court was superficially in accord with the precedents represented by a one-hundred-and-fifty-year-line of cases in holding that contempt is not a "crime" or "criminal prosecution." However, footnote twelve in *Barnett*, by way of dictum, indicated that summary disposition without a jury would be constitutionally limited to the penalty provided for petty offenses.[19] But, because this statement was contained in a terse, unexplained footnote, it was not certain how the dictum was to be applied. The opinion of the Court in *Cheff* adds little to the Barnett

[13] This four-Justice ruling affirming the contempt conviction, was made effective by the concurring opinion of Mr. Justice Harlan, in which Mr. Justice Stewart joined. Their concurrence was based on Green v. United States, 356 U.S. 165 (1958), where it was held that a jury trial is never constitutionally required in criminal contempt cases. Mr. Justice Douglas, with Mr. Justice Black concurring in the dissent, adhered to their previous argument that jury trials are constitutionally required in all criminal contempt cases.

[14] See McNabb v. United States, 318 U.S. 332 (1943).

[15] Cheff v. Schnackenberg, 384 U.S. 373 (1965).

[16] "The trial of all Crimes except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art. III, § 2.

[17] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[18] 376 U.S. 681 (1964).

[19] The text of the footnote states: "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." United States v. Barnett, 376 U.S. 681, 695 n.12 (1964).

dictum other than strengthening the petty offense distinction by referring to 18 U.S.C. § 1 (1964), which declares that an offense, the penalty for which does not exceed six months, is a petty offense.

In the consolidated cases of *Shillitani v. United States*[20] and *Pappadio v. United States*[21] petitioners refused to answer the questions of a grand jury after they had been ordered to answer by the district court. The district court found them guilty of criminal contempt in proceedings under Rule 42(b) and sentenced them to two years imprisonment with the proviso that they would be released sooner if and when they answered the questions of the grand jury. The court of appeals in construing the sentence as conditional, with the right of release upon compliance, rejected the constitutional objections that they were not indicted or given a jury trial. The Supreme Court with only Justice Harlan dissenting, limited the civil contempt sentences to the life of the grand jury. The basis for this decision was the Court's finding that the conditional nature of the sentences made this a civil proceeding for which indictment and jury trial are not constitutionally required.

The limitations imposed on the contempt power by the above cases reflect the influence of Justices Black and Douglas. But these cases also show the Court's intention to avoid constitutional problems. In *Harris* the Court, by reading the requirement of "unusual circumstances" into Rule 42(b), extended the minimal procedural due process protections of Rule 42(b) without basing their decision on the Constitution. In *Cheff*, the Court provided jury trials for criminal contempts in federal courts resulting in sentences of more than six months. This decision appears to be an important step in guaranteeing criminal contemnors the procedural protections of the Constitution. But, unlike the dictum in *Barnett*, the Court bases their decision on the supervisory power of the Court and thus indicates that they are not yet ready to accept Justice Black's and Justice Douglas's classification of contempt as a crime within the meaning of the Constitution. In the civil contempt area, as represented by *Shillitani*, summary commitment of civil contempt has gone unchallenged by the Supreme Court. Even such vigorous activists as Justices Black and Douglas have not questioned the constitutionality of

[20] 384 U.S. 364 (1966).
[21] *Ibid.*

summary proceedings in civil contempt.[22] The basis for this appears to be in the wording of the Constitution restricting application of article III, § 2[23] and the sixth amendment[24] to crimes and criminal prosecution respectively.

Therefore, it appears that the court is adhering to the argument that criminal contempt is sui generis and, since it is not a crime, does not require a jury trial within the meaning of article III, § 2 and the sixth amendment, viewed as of the time of the adoption of the Constitution. Justices Black and Douglas argue that the nature of the contempt power has undergone substantial change since the adoption of the Constitution and the Court should not hesitate to re-evaluate the contempt power in light of the "incredible transformation and growth" it has undergone.[25] This growth is demonstrated by the numerous situations in which the contempt power is now used and by the severity of the punishments that are being imposed.

These cases impose serious restrictions on the use of the contempt power but they do not clear up the confusion that surrounds the contempt area. The tests used by the Court to distinguish between civil and criminal contempt and to determine whether a jury trial is to be granted only compound the existing confusion.

The courts have often addressed themselves to the problem of satisfactorily distinguishing civil from criminal contempts.[26] The distinction is more than academic since all civil contempts are punished summarily. The Court in *Shillitani* looked at the character and purpose of the proceeding to determine whether the contempt was civil or criminal. But the character and purpose of the proceeding as a whole must be correlated with the nature of the penalty.[27] Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he

[22] Green v. United States, 356 U.S. 165, 197 (1958) (opinion of Black, J. dissenting). They are inclined, however, to construe contempt as criminal rather than as civil to insure the procedural safeguards of Rule 42(b). See Nye v. United States, 313 U.S. 33 (1941).

[23] See note 16 *supra.*

[24] See note 17 *supra.*

[25] Green v. United States, 356 U.S. 165, 208 (1958) (opinion of Black, J. dissenting).

[26] See generally Goldfarb, *The Varieties of the Contempt Power,* 13 SYRACUSE L. REV. 44, 46-58 (1961).

[27] Penfield v. Securities & Exch. Comm'n, 330 U.S. 585, 596 (1947).

had refused to do,"[28] the remedy is one for civil contempt. Where the sentence is punitive in its nature and imposed for the purpose of vindicating the authority of the court, the remedy is one for criminal contempt.[29] In *Shillitani*, the Court determined that the purpose of the proceeding was remedial by noting the presence of a purge clause. In turn, the purpose of the proceeding was a factor in determining the character of the proceeding. Therefore, although the Court was successful in correlating the character of the penalty with the character of the proceeding, the relief and procedure available to the contemnor became dependent, to some extent, upon the sentence imposed. Since the procedural rights attached to civil and criminal contempt are so different, this retrospective determination of the character of the proceeding may deprive the contemnor of his due process rights.

The *Cheff* decision indicates that the only criteria in determining whether a jury trial is to be granted is the severity of the sentence actually imposed. The dissenters in both *Barnett* and *Cheff* recognized that the length of the sentence should not be the only factor considered as this distinction is not supported by cases in the contempt field, nor in the field of petty offenses. Cases interpreting the petty offense exception to the jury trial requirement based their decision on the nature of the offense and the maximum potential sentence.[30] The Court in *Cheff* has set up an arbitrary distinction which requires the judge to know the evidence to be presented before the proceeding has actually begun.

It is apparent from these cases and the tests they set forth that the courts approach each case in an ad hoc manner and fail to connect their decision "with any body of law or legal principle."[31] An effective way to resolve the confusion in this area would be to treat both civil and criminal contempt alike. It does not appear that coercion is substantially different from punishment. In either case they may be mitigating circumstances that explain the contemnor's actions. It is submitted that the procedural safeguards available to the contemnor should not depend upon the purpose of the proceeding as the severity of the penalty and the stigma attached to those convicted

[28] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911).
[29] *Id.* at 441.
[30] Cheff v. Schnackenberg, 384 U.S. 373, 387 (1966).
[31] Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44, 56 (1961).

of the offense may be the same whether it be a civil or criminal proceeding.

FRANCIS X. HANLON

Insurance—Statutory Definition of an Uninsured Motor Vehicle When the Liability Insurer is Insolvent or Denies Coverage

North Carolina General Statute section 20-279.21 defines a motor vehicle liability policy, contains certain requirements for provisions of owner's and operator's policies, and includes certain provisions to which such policies will be subject even though not contained in the policy. It provides that unless such coverage is rejected by the insured, no owner's policy shall be issued without coverage for the protection of the persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The practical effect of this latter provision is that when a motorist driving what is determined under the statute to be an "uninsured motor vehicle" negligently injures another motorist covered by liability insurance with uninsured motorists coverage, the injured motorist can be compensated for his injuries up to the limits stated in the policy by his own liability insurer under that uninsured motorists coverage.

A question immediately arises. What is an "uninsured motor vehicle?" In 1965 the North Carolina General Assembly undertook to provide certain definitions of the term which had not been previously defined in the statute itself.

The North Carolina Supreme Court held in 1965 that a vehicle was uninsured when the liability of the negligent party causing the accident was not covered by the policy issued on the vehicle.[1] This decision was made without the benefit of the statutory definition of an uninsured motor vehicle.

After the amendments, North Carolina General Statute section 20-279.21(b)(3) provided that "under this section the term 'uninsured motor vehicle' shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make

[1] Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965). The liability of the negligent party was not covered by the policy because he was driving the vehicle without the permission, knowledge or consent of the named insured.

payment . . . *because of insolvency.*" (Emphasis added.) Also, "[f]or the purpose of this section, an 'uninsured motor vehicle' shall be a motor vehicle as to which there is . . . [liability insurance in at least the amounts specified in North Carolina General Statute section 20-279.5(c)][2] . . . but the insurance company writing the same *denies coverage* thereunder, or has *become bankrupt.* . . ."[3] (Emphasis added.)

In *Rice v. Aetna Cas. & Sur. Co.*[4] plaintiff's automobile was insured under a bodily injury and property damage liability insurance policy issued by the defendant insurance company. The policy contained a rider affording protection against personal injuries and property damage resulting from the negligent operation of an uninsured motor vehicle by another motorist. In 1962 plaintiff was injured in an automobile accident resulting from the negligence of a motorist whose automobile was covered by liability insurance. Subsequent to the accident the negligent motorist's insurer became insolvent. Although this situation seems to fall squarely within the statute, our court held that plaintiff could not obtain compensation from his own liability insurer under the uninsured motor vehicle endorsement since the negligent party's vehicle was not uninsured.[5]

[2] The amounts specified are $5000 because of bodily injury or death of one person in any one accident, $10,000 because of bodily injury or death to two or more persons in any one accident, and $5000 for damage of property of others in any one accident.

[3] Under the amendment further definitions of an "uninsured motor vehicle" are: (1) a vehicle as to which there is no liability insurance in at least the amounts required by statute; or no bond or deposit of securities in lieu of such insurance; (2) a vehicle the owner of which has not qualified as a self-insurer; and (3) a vehicle not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act. However, the term does not include: (1) a motor vehicle owned by the named insured; (2) a motor vehicle owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law; (3) a motor vehicle owned by the United States, Canada, a state, or any agency of these, but excluding political subdivisions thereof; (4) a land motor vehicle or trailer, if operated on rails or crawler treads or while located for use as a residence or premises and not as a vehicle; and (5) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads. N.C. GEN. STAT. § 20-279.21 (b)(3) (Supp. 1965).

[4] 267 N.C. 421, 148 S.E.2d 223 (1966).

[5] *But cf.* North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964) where the Court held that when the receiver of the insolvent insurer lacked sufficient funds to continue defense of the action against the insured's administratrix, it had effectively denied coverage, and under a statute defining an uninsured motor vehicle as one where the liability insurer denies coverage, the negligent party's vehicle was uninsured; State Farm Mut.

The court said:

> The fact that [the negligent party's liability insurer] . . . was, subsequent to the collision causing damage to the plaintiff, placed in receivership because of insolvency did not render defendant [plaintiff's liability insurer] liable on the policy issued plaintiff. Such insolvency did not make the . . . [negligent party's vehicle] . . . an uninsured automobile.[6]

The court relied for authority on *Hardin v. American Mut. Fire Ins. Co.*[7] decided in 1964 on similar facts and reaching the same result as *Rice*.

In a case decided subsequent to the *Hardin* decision and to the amendments, the court said, "It is noted that G.S. § 20-279.21(b)(3) was amended . . . so as to preclude the result reached by this court in *Hardin v. American Fire Insurance Company*."[8] However, the result in *Hardin* was reached again in *Rice*.

The amendments were raised in briefs by counsel for both sides. Counsel for defendant appellant insurance company argued that since the accident occurred before the statute was amended, it did not provide coverage to the plaintiff in this case.[9] Counsel for plaintiff appellee argued that since the act was to be in full force from and after its ratification and did not provide that it should affect pending litigation, the statute governed the insurance company's liability to plaintiff under the uninsured motor vehicle endorsement.[10]

The result is at least questionable. For a fair resolution of the interests of the injured plaintiff and his insurer from whom he seeks

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Auto. Ins. Co. v. Brower, 204 Va. 887, 134 S.E.2d 277 (1964) where the Court held, under a similar statute, that since the insolvent insurer did not appear or defend the suit against its negligent insured, nor pay the judgment, it had denied coverage thereby making the negligent party's vehicle uninsured.

[6] 267 N.C. at 424, 148 S.E.2d at 225.

[7] 261 N.C. 67, 134 S.E.2d 142 (1964). The court relied on Federal Ins. Co. v. Speight, 220 F. Supp. 90 (E.D.S.C. 1963) where the judge noted that the South Carolina statute defining an uninsured motor vehicle had been amended after the accident occurred to include a vehicle covered by liability insurance from an insolvent carrier, but without discussion did not apply it to the parties; and Uline v. Motor Vehicle Acc. Indem. Corp., 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961); *accord*, Swaringin v. Allstate Ins. Co., 399 S.W.2d 131 (Mo. Ct. App. 1966); Stone v. Liberty Mut. Ins. Co., 397 S.W.2d 411 (Tenn. Ct. App. 1965).

[8] Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965) (dictum).

[9] Brief for Appellant, p. 18, Rice v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966).

[10] Brief for Appellee, p. 15.

compensation, the court should have discussed and decided whether or not the amendment applied retroactively. On its face, the statute would clearly apply to any case such as *Rice* in which the accident occurred after the amendments in 1965.

As stated above, North Carolina General Statute section 20-279.21(b)(3) now provides by virtue of the amendment that an "uninsured motor vehicle" for the purpose of that section is a motor vehicle as to which there is liability insurance in at least the amounts required by statute, but the insurer writing it "denies coverage thereunder."

This provision makes a judicial definition of the term "denies coverage" necessary. The cases available in other jurisdictions with similar provisions lay down only broad guidelines to aid in defining the term.

A New York statute, operating upon the same principle as that of North Carolina, provides protection for the injured party when the liability insurer of the negligent party has "disclaimed liability or denied coverage because of some act or omission of [the negligent party]. . . ."[11] "To deny coverage is to take the position that for some reason or other the policy does not encompass the particular accident."[12] A disclaimer of liability occurs where the insurer refuses to respond because of some act of the insured, not directly connected with the accident itself, such as lack of cooperation, fraud, or giving late notice of the accident.[13]

A disclaimer of liability under the New York view apparently would not be applicable in North Carolina to a carrier registered to do business in the state since by statute a violation of the liability policy by the insured will not void the policy,[14] nor under the North Carolina view, prevent the injured party from recovering from the insurer if the negligent insured's liability has been established.[15]

It has been held in New York that there was a denial of cover-

[11] N.Y. INS. LAW § 608(c).

[12] Uline v. Motor Vehicle Acc. Indemn. Corp., 28 Misc. 2d 1002, 1005, 213 N.Y.S.2d 871, 874 (Sup. Ct. 1961) (dictum).

[13] *Id.* at 1005, 213 N.Y.S.2d at 874.

[14] N.C. GEN. STAT. § 20-279.21(f)(1) (Supp. 1965) provides that "The liability of the insurance carrier . . . shall become absolute whenever injury or damage . . . occurs; . . . no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. . . ."

[15] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); *accord*, Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962) (insurance issued under an assigned risk policy).

age when the insurer notified the injured party that there was "no liability on its policy" because the insured had loaned his automobile to the party who had negligently caused the injuries while driving it.[16] On the other hand, there is no denial of coverage (or disclaimer of liability) where the liability insurer did not answer inquiries of the injured party's attorney for eight and one-half months.[17] Also, there is not a denial of coverage where the liability insurer denied liability because the policy had expired before the accident,[18] terminated for non-payment of premiums prior to the accident,[19] or been cancelled before the accident.[20] Of course in these latter three instances, the vehicle would be uninsured in North Carolina since there was no applicable liability policy in effect.

Other jurisdictions with statutory provisions similar to that of North Carolina concerning denial of coverage have spoken on the matter. The South Carolina Supreme Court has held that when the liability insurer expressly denied coverage to its insured because of misstatements in his application, his automobile became an uninsured motor vehicle within the meaning of the statute.[21] The Virginia Supreme Court of Appeals has held that a motor vehicle became uninsured under the terms of its statute when the liability insurer denied coverage because the insured failed to cooperate with the insured in the suit against the insured by the injured party.[22] Under the North Carolina view, the insurers in these two cases apparently could not deny coverage when faced with a suit by an injured party who has recovered a judgment against the insured if they were registered to do business in the state, and if the policy had been issued in the state. North Carolina General Statute section 20-279.21(f)(1) (Supp. 1965), providing that no statement by or for the insured and no violation of the policy will defeat that policy,

[16] Rivera v. Motor Vehicle Acc. Indem. Corp., 22 App. Div. 2d 201, 254 N.Y.S.2d 480 (App. Div. 1964), *motion for leave to appeal denied*, 15 N.Y.2d 485, 206 N.E.2d 363, 258 N.Y.S.2d 1025 (1965).

[17] Application of DeStefano, 34 Misc. 2d 68, 228 N.Y.S.2d 404 (Sup. Ct. 1962).

[18] Brucker v. Motor Vehicle Acc. Indem. Corp., 41 Misc. 2d 281, 245 N.Y.S.2d 640 (Sup. Ct. 1963).

[19] Application of Johnson, 218 N.Y.S.2d 289 (Sup. Ct. 1961).

[20] Arculin v. Motor Vehicle Acc. Indem. Corp., 232 N.Y.S.2d 615 (Sup. Ct. 1962).

[21] Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965).

[22] McDaniel v. State Farm Mut. Auto. Ins. Co., 205 Va. 815, 139 S.E.2d 806 (1965).

applies only to insurance companies duly authorized to transact business in North Carolina.[23] However, these cases could be applicable (1) where the insurer who avoided making payment was not registered to do business in North Carolina and its insured was a non-resident,[24] and (2) where the insurance policy was issued in another state to a resident of that state, in which case the rights and obligations of the parties would be fixed by the laws of that other state.[25]

The North Carolina Supreme Court has not specifically defined the term "denies coverage" as it applies to the recently amended statute. However, it has used the term "deny coverage" to describe action of a liability insurer when it desired to avoid payment on the policy on the ground that the vehicle (a tractor-trailer unit) its insured was driving was not an "automobile" within the terms of the policy, and therefore the policy did not provide coverage.[26] It has said that the refusal of a liability insurer to defend an action against its insured "was tantamount to a denial of liability."[27] Where the liability insurer sought to avoid payment alleging that the vehicle involved in the accident was excluded from the coverage of the policy, the court said that the insurer had "denied liability."[28] The action of the insurers in these cases should place the vehicle involved in the category of an "uninsured motor vehicle" under the statute.

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[23] See notes 14-15 *supra.*

[24] N.C. GEN. STAT. § 20-279.20 (Supp. 1965) provides that the "non-resident owner of a motor vehicle not registered in this State may give proof of financial responsibility by filing with the Commissioner [of Motor Vehicles] a written certificate . . . of an insurance carrier authorized to transact business in the state in which the motor vehicle . . . is registered. . . ." The commissioner shall accept that certificate upon the condition that the insurance carrier agrees in writing that the policy shall be deemed to conform with the laws of North Carolina with respect to the terms of motor vehicle liability policies issued in the state. Presumably, if such an insurance carrier does not want to pay on the policy because of a violation of a condition by the insured, and does not agree that its policy will conform to the laws of the state, there is no way to compel it to pay in North Carolina, assuming its refusal to pay is justified, and the injured party would be deprived of any protection by insurance unless he could collect upon his own liability insurance under the uninsured motorists coverage.

[25] Conner v. State Farm Mut. Auto. Ins. Co., 265 N.C. 188, 143 S.E.2d 98 (1965).

[26] Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 724, 117 S.E.2d 733, 737, 85 A.L.R.2d 496, 501 (1961).

[27] Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 502, 135 S.E.2d 209, 211 (1964).

[28] Kirk v. Nationwide Mut. Ins. Co., 254 N.C. 651, 654, 119 S.E.2d 645, 647 (1961).

It has been said that "[u]ninsured motorists coverage 'is designed to further close the gaps inherent in the motor vehicle financial responsibility and compulsory insurance legislation.' "[29] Such a "gap" certainly occurs when a motorist, driving a vehicle supposedly covered by liability insurance, negligently injures another party, insured under uninsured motorists coverage, and the negligent party's liability insurer refuses to pay the injured party on the ground that the policy did not cover the vehicle, the driver, or the type of accident involved. The vehicle involved should then be considered "uninsured" within the terms of the statute because the liability insurer has denied coverage, thus enabling the injured party to collect upon his uninsured motorists coverage. Such a result fits the judicially stated purpose of our statutory scheme of compulsory liability insurance "to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. . . ."[30]

If a vehicle is uninsured when there is no liability policy at all or when the liability insurer is insolvent, then it should be uninsured when the liability insurer will not pay. The effect in each instance is to deprive the injured person of the protection afforded by liability insurance contrary to the principle of protection for all innocent motorists provided by the Motor Vehicle Financial Responsibility Act.

PENDER R. MCELROY

Labor Law—Collective Bargaining—Is the Court Replacing the Union

Labor-management disputes in railroad operations are regulated by the Railway Labor Act.[1] It provides for negotiation,[2] mediation,[3] voluntary arbitration,[4] and fact finding.[5] However, the ulti-

[29] Buck v. United States Fid. & Guar. Co. 265 N.C. 285, 288, 144 S.E.2d 34, 36 (1965).
[30] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 126, 116 S.E.2d 482, 487 (1960).

[1] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964).
[2] 64 Stat. 1238 (1951), 45 U.S.C. § 152, Second (1964).
[3] 78 Stat. 748, 45 U.S.C. § 154 (1964).
[4] 48 Stat. 1197 (1934), 45 U.S.C. § 157 (1964).
[5] 63 Stat. 107 (1949), 45 U.S.C. § 155 (1964).

mate weapon of "self-help"[6] is preserved. Management is permitted to hire replacements, make unilateral changes,[7] and the unions can strike. But in a nationwide emergency, Congress can and has substituted compulsory arbitration for self-help in a labor dispute.[8]

The ultimate form of union self-help is the right to strike, but it is not without limitations. Strikes such as "sit-downs"[9] and "mutinies"[10] are prohibited. Furthermore, if the strike is for economic reasons, the jobs of strikers are forfeited if permanent strike replacements are hired.[11]

The employer, as well, may resort to self-help when good faith collective bargaining fails.[12] He may hire strike replacements to keep his business operative[13] or "shut-down"[14] at a time of his own choosing. But here again limitations are imposed. Employer sympathy lock-outs[15] and super seniority privileges[16] are examples of prohibited measures.

The availability of self-help however, does not terminate the bargaining relationship. It is still unlawful for the employer to make unilateral changes in terms of conditions of employment and he must negotiate with the union in regards to pay rates and working conditions of strike replacements.[17]

The recent case of *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*[18] represents an inroad into the aforementioned labor-management concepts of self-help, at least in the context of railroad

[6] See note 27 *infra.*

[7] In NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), the employer hired replacements to operate his business and was not required to discharge them on return of the participants in an economic strike.

[8] *E.g.*, Act of Aug. 28, 1963, 77 Stat. 132, in which Congress provided for a special arbitration board to establish conditions that would be in effect for a two-year period, thus avoiding a threatened nationwide railroad union strike. See Brief for Brotherhood of Locomotive Firemen & Enginemen as Appellant, pp. 4-5, Brotherhood of Locomotive Firemen & Engineman v. Bangor & Aroostock R.R., —— F.2d —— (D.C. Cir. 1966).

[9] *E.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[10] See Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

[11] See note 7 *supra.*

[12] See note 27 *infra.*

[13] Note 7 *supra.*

[14] American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

[15] See NLRB v. Brown, 380 U.S. 278 (1965), for the proposition that a lockout based on hostility to the process of collective bargaining would be illegal.

[16] See note 37 *infra.*

[17] See note 36 *infra.*

[18] 384 U.S. 238 (1966).

operations. The labor unions,[19] on behalf of nonoperating employees,[20] demanded a general twenty-five-cents-per-hour wage increase and six months notice of prospective lay-offs and job terminations. This demand was made of virtually all Class One railroads, including the defendant.

Pursuant to the Railway Labor Act negotiation and mediation ensued but no agreement was reached. A presidential emergency board[21] was then created to conduct hearings and make settlement recommendations. Its efforts were successful with respect to all railroads concerned except Florida East Coast.

Subsequent to the failure of defendant and the unions to come to terms, the latter struck and defendant hired replacement workers.[22] In so doing, new contracts that were at variance with the existing collective agreements in respect to wages and notice were negotiated with the replacements. Florida East Coast further attempted to nullify the previous union-negotiated agreements by substituting new contracts that embodied additional departures. These were foreign to the union agreements in particulars other than those that were the initial subject of dispute. The new agreements were challenged by the United States as violative of the Railway Labor Act.[23] The ensuing litigation resulted in a decision that the railroad

[19] The unions referred to are a group of eleven cooperating labor organizations representing workers employed by the railroad. Brief for Petitioner, p. 4.

[20] Employees in "so-called non-operating crafts—clerks, machinists, etc." *Id.* at 4 n.1.

[21] § 160, providing for the board, states in part:

> If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .
>
> After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

48 Stat. 1197 (1934), 45 U.S.C. § 160 (1964).

[22] For a time, the railroad ceased operations altogether as a result of the strike. This was prior to the hiring of the replacements in question.

[23] The segment of the act in question was 64 Stat. 1238 (1951), 45 U.S.C. § 152, Seventh (1964) which provides:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

had violated the act by this unilateral action. But it was held that the railroad could institute changes if they were first submitted to a court and found to be "reasonably necessary to effectuate its rights to continue to run its railroad under the strike conditions."[24] This in effect, opened the way for defendant to secure proposed contractual changes by court approval without resorting to further negotiation with the union. Such changes could encompass areas that had not heretofore been the subject of a union-management dispute.[25]

The Supreme Court approved this approach, including the "reasonably necessary" criteria enunciated by the lower court. The union contended that the only changes Florida East Coast could legitimately make in formulating the replacement worker agreements were those that had previously been submitted to negotiation as required by the act. This proposition was rejected on the basis that if the mediation procedure was invoked for every individual change deemed necessary during a strike, the carrier would be crippled. In addition, the Court felt that the union proposal would prevent the

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48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964) provides;

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[24] Florida East Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 182 (5th Cir. 1964). Subsequent to this decision the district court allowed the alterations enumerated in note 25 *infra*. This was affirmed in Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry., 348 F.2d 682 (5th Cir. 1965) and precipitated the present holding.

[25] The district court had permitted Florida East Coast:

> to exceed the ratio of apprentices to journeymen and age limitations established by the collective bargaining agreement to contract out certain work, and to use supervisory personnel to perform specified jobs where it appeared that trained personnel were unavailable.

384 U.S. at 243.

It must be remembered that the subject of the original negotiations was wages and notice. See text accompanying note 20 *supra*.

railroad from making a "reasonable effort"[26] to continue operations during the strike and thereby constitute a breach of public duty on the part of the carrier. In fact, the duty of the railroad to the public appeared to be the Court's major concern. It discussed the potential disaster of a general shutdown of service and stated that the carrier's right of self-help[27] would be meaningless if the already cumbersome negotiation procedure was extended.

Given that the public interest in uninterrupted carrier service is substantial and that the present ruling will protect that interest, what of the public interest in the protection of organized labor? It is submitted that Congress was well aware of the vital nature of railway transportation at the time the act was passed.[28] As the right to strike was not prohibited, it would seem that union equities were considered a substantial public interest. Moreover, as pointed out by the dissent of Mr. Justice White, the act does not call for compulsory arbitration of disputes,[29] a measure that would virtually insure continued carrier operation in the face of labor-management disagreements. In addition, there is no absolute duty on the carrier to continue service; only a reasonable effort is required.[30] Thus it is reasonable to assume that Congress did not intend to negate the effectiveness of a strike where the railroad is concerned, though admittedly desiring to encourage settlements by protracted negotiation procedures in hopes that a strike would be unnecessary.

Although it is uncertain what contractual changes a court may find "reasonably necessary" in a particular fact situation, the poten-

[26] The Court did not consider the duty of the carrier to operate absolute, but stated that the railroad:

> owes the public reasonable efforts to maintain public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy.

Id. at 245.

[27] The Court referred to Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R., 372 U.S. 284 (1963), as authority for the proposition that self-help is available to both parties to a dispute when statutory procedures have failed to result in settlement. 384 U.S. at 244. Of course, the strike is the union method of exercising this right.

[28] May 20, 1926 was the date of initial enactment.

[29] It provides for voluntary arbitration but specifically states, "The failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." 48 Stat. 1197 (1934), 45 U.S.C. § 157, First (1964).

[30] See note 26 *supra.*

tial danger to union bargaining power is significant. As the purpose of a strike is application of economic pressure to management, it must hamper management activity to be of any consequence. Assuming that a railroad is able to convince a court that sweeping changes are necessary to effectively operate under strike conditions, the inconvenience of changing personnel might be the single major obstacle that management would face. Any expense incurred thereby would be overshadowed by the pecuniary consequences of yielding to substantial union demands for wage increases and alterations of working conditions.

The knowledge that collective agreements that were in effect prior to the strike would remain the standard contracts and return to prominence at the conclusion of the dispute[31] would be little consolation from the union viewpoint. As dissatisfaction with existing arrangements is the primary motive for strikes, a return to the same would not justify the effort. In fact, labor would suffer more than management as participating rank and file would be unemployed during the strike while management continues to function with relative ease. The mere prospect of such an occurrence will constitute a deterrent to union activity, though in the final analysis a court may not agree that management demands were "reasonably necessary."

As to enforcement of this "reasonably necessary" standard, the Court in this case stated that it must be strictly construed and:

> The carrier must respect the continuing status of the collective bargaining agreement and make only those changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation.[32]

It is submitted that the above does not constitute a standard that is susceptible of strict construction. The necessities, as seen by a court faced with such determination, will depend upon various factual issues that may not fit into a neat pattern. Moreover, the language quoted would seem to indicate a balance in favor of the collective agreements that a carrier must overcome.[33] But consider-

[31] The collective agreements were to constitute the basic framework upon which the court approved changes would be tacked. See note 33 *infra*.

[32] 384 U.S. at 248.

[33] The Court stated that "the burden is on the carrier to show the need for any alteration . . . that it is required to employ in order to maintain that continuity of operation that the law requires of it." *Id.* at 248.

ing the Court's emphasis on the plight of the railroad undertaking "to keep its vital services going *with a substantially different labor force*,"[34] the balance disappears. The carrier will be operating with a substantially different labor force in every strike situation where contractual changes are sought. Furthermore, it is unlikely that replacements, as a group, will ever have the training and railroad orientation of employees for whose benefit the collective agreements were tailored.[35] Thus the union is faced with the prospect of management having a built-in argument in support of its contentions.

If wholesale changes do result from such a process, what of the right of the union "to represent all employees in the craft irregardless of union membership"[36] as enunciated by the Court? This phrase is without substance if the union is unable to make a showing of strength during the crucial strike period. Such showing would be evidenced by a continued adherence to existing collective agreements. With the railroad now able to appeal to the courts for extensive alteration of these agreements, can it be said that union representation is not thereby undermined?[37]

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[34] *Id.* at 245.

[35] The Court emphasized that the qualifications of replacements are unlikely to blend with "the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force." *Id.* at 246.

[36] The Court refers to Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) in which it was stated:

> The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. . . . The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.

Id. at 200-01.

[37] In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), replacement workers hired during a strike were given "20 years additional seniority . . . which would be available only for credit against future layoffs and which could not be used for other employee benefits based on years of service." *Id.* at 223. The same benefits were accorded strikers who returned to work.

The Court evidenced concern for continuing union strength in strike situations by declaring the seniority gambit an unfair labor practice. In regard to management claims that such action was taken in pursuit of legitimate business purposes, the Court stated:

> Nevertheless, his conduct *does* speak for itself—it *is* discriminating and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

Furthermore, it is far from certain that the effect of the present holding will be confined to union activity within the purview of the Railway Labor Act. Neither the Court[38] nor the National Labor Relations Board[39] has hesitated to cite cases involving the act as authority in otherwise unrelated areas of labor law. Thus the instant decision may serve as precedent for similar appeals in other industries, especially if they are found to be charged with a public duty.

But regardless of future expansion, it is submitted that the instant case creates an imbalance[40] in the railway labor process that unions are unlikely to overcome.[41] If taking such a step is truly necessary to maintain the vital function of carrier operations in the present economic complex, it would seem to be a congressional rather than judicial prerogative.

WILLIAM H. FAULK, JR.

Real Property—Discontinuance of Dedicated Streets—Disposition of Property

Having been established by dedication, a street retains its status as a public way until it is discontinued in a manner provided by law.[1] Generally, statutes provide that streets may legally cease to exist

Id. at 228. In light of the Court's reasoning, should conduct that discourages union membership be treated differently if the employer is able to secure the approval of a lower court? This situation may arise in various areas of labor law if the *Florida East Coast* decision is not limited to the confines of the Railway Labor Act. For a consideration of such possibility see note 39 *infra* and the accompanying text.

[38] *E.g.*, Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir. 1955), *rev'd and remanded per curiam*, 350 U.S. 892 (1956), in which the Supreme Court cited Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) as authority for reversing the lower court finding of "no jurisdiction" in a racial discrimination case against the unions.

[39] *E.g.*, Hughes Tool Co., 147 N.L.R.B. 1573 (1966), in which the board cited *Steele* as authority for application of the duty of fair representation in labor law.

[40] For the proposition that a balancing process is in order, *i.e.* weighing the right to strike against the right of the employer to maintain his business, see NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[41] Mr. Justice White considered the majority opinion "very close to a judgment that there shall be no strikes in the transportation business, a judgment which Congress rejected in drafting the Railway Labor Act." 384 U.S. at 250.

[1] 11 McQUILLAN, MUNICIPAL CORPORATIONS § 30.182, at 101 (3d ed. 1964) [hereinafter cited as McQUILLAN].

upon vacation by the direct action of the public authorities or by withdrawal from dedication in the case of non-use or abandonment by the public.[2] Discontinuance of a street by either method effectually extinguishes the public rights in it.[3] At this point a question arises as to the ownership of the property within the boundaries of the street.[4] Two conflicting answers are found in the North Carolina statutes, both of which are applied by the North Carolina Supreme Court without regard to the inconsistency.

The North Carolina statutory scheme for vacation of a dedicated street[5] embodies the majority rule[6] that when a street is vacated, title to the street vests in those persons owning land abutting on it.[7] A different answer obtains when a street is withdrawn from dedication in North Carolina,[8] as the dedicator, not the abutting landowner, is presumed to own the fee.[9] However, where a street sought to be withdrawn was dedicated by a now-extinct corporation, the abutting landowners take the property.[10] The North

[2] 2 ELLIOT, ROADS AND STREETS § 1172 (4th ed. 1926); 11 McQUILLAN §§ 30.184, .185.

[3] 2 AMERICAN LAW OF PROPERTY § 9.55, at 500 (Casner ed. 1964) [hereinafter cited as AMERICAN LAW OF PROPERTY]; 11 McQUILLAN § 30.202(a).

[4] See generally 2 AMERICAN LAW OF PROPERTY § 9.55, at 500-02; 11 McQUILLAN § 30.202(a).

[5] N.C. GEN. STAT. § 153-9(17) (Supp. 1965) authorizes the county boards of commissioners "to close any street or road or portion thereof . . . that is now or may hereafter be opened or dedicated, either by recording of a subdivision plat or otherwise." Similar power is given to cities to "close any street or alley that is now or may hereafter be opened. . . ." N.C. GEN. STAT. § 160-200(11) (1964). These statutes must be construed together "so as to produce a harmonious body of legislation. . . ." Town of Blowing Rock v. Gregorie, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956).

[6] Cases cited note 26 *infra* and accompanying text.

[7] Upon the closing of a street or road in accordance with the provisions hereof, all right, title and interest in such portion of such street or road shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to such portion of such street or road, and the title of each . . . shall, for the width of the abutting land . . . extend to the center of such street or road.

N.C. GEN. STAT. § 153-9(17) (Supp. 1965).

[8] N.C. GEN. STAT. § 136-96 (1964). Withdrawal of a dedicated street is appropriate if the street "shall not have been actually opened and used by the public within fifteen (15) years from and after the dedication thereof. . . ." N.C. GEN. STAT. § 136-96 (1964).

[9] *Ibid.*

[10] [T]hat where any corporation has dedicated any strip . . . of land . . . and said dedicating corporation is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip . . . the right, title and interest in

Carolina court has expressly endorsed statutory disposition of street property to the dedicator, as well as the principles underlying this result,[11] but by enforcing the statutory formula that allows the abutting landowners to take the fee, the court has impliedly endorsed a conflicting rationale and result.[12]

Disposition of street property to the dedicator is predicated on the assumption that when a street is dedicated, the dedicator grants easements of passage in the street to two distinct classes of persons,[13] but does not part with his title to it.[14] When he[15] divides and plats a tract of land into lots and streets, and sells lots with reference to the plat,[16] the sales operate as the dedicator's offer[17] of the streets to the public.[18] If the offer is accepted,[19] the public acquires ease-

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said strip . . . shall be conclusively presumed to be vested in those persons, firms or corporations owning lots . . . adjacent thereto. . . . N.C. GEN. STAT. § 136-96 (1964). The statute doesn't provide how the fee should vest in the adjacent landowners, that is, as tenants in common or individually for the width of the abutting property. For a suggested answer, see Lancaster, *Withdrawal from Dedication and Closing of Roads*, 13 N.C.B.A. BAR NOTES 5, 11 (Feb. 1962).

[11] See note 43 *infra* and accompanying text.

[12] See note 45 *infra* and accompanying text.

[13] Technically, the result of a common law dedication was an easement in the public, and not some particular person, though the term is used today to encompass both public and private rights resulting from dedication of a street. 4 TIFFANY, REAL PROPERTY §§ 1099, 1103 (3d ed. 1939) [hereinafter cited as TIFFANY].

[14] "A common-law dedication . . . does not affect the ownership of the land. . . ." *Id.* § 1112, at 366; 11 McQUILLAN §§ 33.03, at 635, 33.66, at 807, 33.68, at 809.

[15] Only the owner can dedicate land, and he must evidence a clear and unequivocal intent to do so. 4 TIFFANY §§ 1100-01.

[16] The plat does not have to be recorded to effect a valid dedication. Somersette v. Stanaland, 202 N.C. 685, 163 S.E.2d 804 (1932).

[17] The offer is revocable before acceptance by the public. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Rowe v. City of Durham, 235 N.C. 158, 69 S.E.2d 171 (1952).

[18] Wofford v. Highway Comm'n, 263 N.C. 677, 140 S.E.2d 376 (1965); Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940). This method of dedicating streets is by far the most common method of doing so. 11 McQUILLAN § 33.22. Compare Todd v. White, 246 N.C. 59, 97 S.E.2d 439 (1957). There the court held that a sale with reference to a plat did not effect a dedication where the dedicator expressly reserved the right to control the streets.

[19] The majority rule and the rule in North Carolina is that there must be an offer and an acceptance by the public to constitute a valid dedication of land to public use. *E.g.*, Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956); 11 McQUILLAN § 33.02, at 628, and cases cited therein.

ments[20] in the streets lasting until the streets are discontinued.[21] The sale of lots with reference to a plat also vests in every purchaser an easement in any street shown on the plat necessary for reasonable access to his property.[22] Regardless of acceptance or abandonment of public rights in a particular street,[23] a purchaser's easement terminates only when the use of that street is no longer needed as an access route.[24] Though the street property is subject to these

In North Carolina, acceptance by the public can be shown by the public authority's exercising acts of control over the streets, such as opening, improving, or maintaining them. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956).

[20] In North Carolina, the dedicator "is equitably estopped . . . in reference to the public . . . from denying the existence of the *easement* thus created." Green v. Miller, 161 N.C. 25, 30, 76 S.E. 505, 507 (1912). (Emphasis added.) See 11 McQUILLAN §§ 33.66, .68; 4 TIFFANY § 1112. Statutes in a few states provide that the public acquires the title to the streets when they are dedicated. *E.g.*, CAL. CIV. CODE § 670; COLO. REV. STAT. ANN. § 139-1-7 (1963); OHIO REV. CODE ANN. § 711.07 (Page 1954); OKLA. STAT. ANN. tit. 11, § 515 (1959). See generally 11 McQUILLAN §§ 33.03, at 635, 33.69.

[21] "[N]o person shall have any right, or cause of action . . . [after a street is withdrawn from dedication], to enforce any public . . . easement therein." N.C. GEN. STAT. § 136-96 (1964). To the same effect is N.C. GEN. STAT. § 153-9(17) (Supp. 1965) which implies that public rights are extinguished upon vacation of the street, by giving "all right, title and interest in . . . the street . . ." to the abutting landowners.

[22] The purchaser

> has a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property is a necessity peculiar to himself. The right is in the nature of an easement appurtenant to the property. . . .

Sanders v. Town of Smithfield, 221 N.C. 166, 170, 19 S.E.2d 630, 633 (1942). *Accord*, Wofford v. Highway Comm'n, 263 N.C. 677, 14 S.E.2d 376 (1965); Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940). See generally 2 AMERICAN LAW OF PROPERTY § 9.54, at 493-94; 28 C.J.S. *Easements* §§ 39, 88 (1941); 11 McQUILLAN § 33.73; 3 TIFFANY § 800. Abridgment or destruction of this easement by the public is a compensable property taking. Sanders v. Town of Smithfield, 221 N.C. 166, 170, 19 S.E.2d 630, 633 (1945).

[23] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 83 (1962); Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961); Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943).

[24] Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961); Evans v. Horne, 226 N.C. 581, 39 S.E.2d 612 (1946). The withdrawal statute has "no application in any case where the continued use of any strip of land dedicated for street . . . purposes shall be necessary to afford convenient ingress or egress to any lot . . . sold . . . by the dedicator of such street. . . ." N.C.

easements, the dedicator's title is unaffected except to the extent that the easements, for their duration, are encumbrances on it.[25] Hence, if the dedicator grants only easements, he obviously should be entitled to the reversion when the easements cease.

However, in most jurisdictions the property reverts to the abutting landowners instead of the dedicator.[26] The rationale of such disposition is based on the widely recognized principle that when a dedicator sells a lot abutting on a street, he is presumed, in the absence of express words to the contrary,[27] to convey with the lot the title to the center of the street.[28] Thus, it is the abutting land-

GEN. STAT. § 136-96 (1964). Similarly, a street cannot be vacated unless it appears "that no individual owning property in the vicinity of said street . . . will thereby be deprived of reasonable means of ingress an egress to his property. . . ." N.C. GEN. STAT. § 153-9(17) (Supp. 1965). However, adverse possession can run against the holder of the access easement as well as against the holder of the fee in the street if the public has not accepted the street or if it has abandoned an accepted street. City of Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959); Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E.2d 104 (1931).

[25] See note 14 *supra.*

[26] *E.g.*, Main v. Legnitto, 230 Cal. App. 2d 667, 41 Cal. Rptr. 223 (Dist. Ct. App. 1964); Gorby v. McEndarfer, 135 Ind. App. 74, 191 N.E.2d 786 (1963); Board of Comm'rs v. Clark, 157 Kan. 132, 138 P.2d 449 (1943); Valoppi v. Detroit Eng'r & Mach. Co., 339 Mich. 674, 64 N.W.2d 884 (1954); American Steel & Wire Co. v. City of St. Louis, 354 Mo. 692, 190 S.W.2d 919 (1945); Greenberg v. L.I. Snodgrass Co., 161 Ohio St. 351, 119 N.E.2d 292 (1954); Fenton v. Cedar Lumber & Hardware Co., 17 Utah 2d 99, 404 P.2d 966 (1965); Bond v. Green, 189 Va. 23, 52 S.E.2d 169 (1949); Woehler v. George, 65 Wash. 2d 519, 398 P.2d 167 (1965). See generally 2 AMERICAN LAW OF PROPERTY § 9.55, at 501; 11 McQUILLAN § 30.202(a), at 161-63; 3 TIFFANY § 931.

[27] *E.g.*, Standard Oil Co. v. Milner, 275 Ala. 104, 152 So. 2d 431 (1962); Rahn v. Hess, 378 Pa. 264, 106 A.2d 461 (1954); Williams v. Miller, 184 Va. 274, 35 S.E.2d 127 (1945).

[28] *E.g.*, Taylor v. Continental Southern Corp., 104 Cal. App. 2d 425, 233 P.2d 577 (Dist. Ct. App. 1951); St. Clair Co. Housing Authority v. Southwestern Bell Tel. Co., 387 Ill. 180, 56 N.E.2d 357 (1944); Hylton v. Belcher, 290 S.W.2d 475 (Ky. 1956); Kreamer v. Harmon, 336 S.W.2d 561 (Ky. Ct. App. 1960); Burkett v. Ross, 227 Miss. 315, 86 So. 2d 33 (1956); Skrmetta v. Moore, 202 Miss. 585, 30 So. 2d 53 (1947); Luneau v. MacDonald, 103 N.H. 273, 173 A.2d 44 (1961); Snyder v. County of Monroe, 2 Misc. 2d 946, 153 N.Y.S.2d 479 (Sup. Ct. 1956); Perkins v. Village of Mexico, 200 Misc. 2d 294, 102 N.Y.S.2d 60 (Sup. Ct. 1950); Finlaw v. Hunter, 87 Ohio App. 543, 96 N.E.2d 319 (1949); McLaughlin v. Cybulski, 192 Pa. Super. 7, 159 A.2d 14 (1960); Rahn v. Hess, 378 Pa. 264, 106 A.2d 461 (1954); Newman v. Mayor of City of Newport, 73 R.I. 385, 57 A.2d 173 (1948); State v. Williams, 161 Tex. 1, 335 S.W.2d 834 (1960); City of Houston v. Hughes, 284 S.W.2d 249 (Tex. Civ. App. 1955); Heller v. Woodley, 202 Va. 994, 121 S.E.2d 527 (1961). See generally 3 AMERICAN LAW OF PROPERTY § 12.112; Annot., 49 A.L.R.2d 982 (1956).

owner and not the dedicator whose property is subject to the private access[29] and public[30] easements created by dedicating a street. Consequently, when a street is no longer needed as an access route and when the public surrenders its rights in it, the abutting landowner is entitled to the fee in that portion of the street adjacent to his property.[31]

The point of divergence of the North Carolina statutes is the determination of whether to accept the majority rule that abutting landowners acquire title or to assume that they acquire only access easements. The withdrawal statute,[32] excluding that portion dealing with dedication by now-extinct corporations,[33] apparently codifies the view that the abutting landowner has only an access easement. Hence, title to the dedicated street remains in the dedicator,[34] and the unencumbered fee necessarily reverts to him when the public[35] and private[36] easements cease. But both the vacation statute[37] and the provision in the withdrawal statute relating to streets dedicated by now-extinct corporations[38] embody the majority rule that the abutting landowner is entitled to the reversion.[39] The implication is that he, not the dedicator, held the title to the street during the continuance of the public and private easements.

The inconsistency, however, is not confined to the statutes, for the North Carolina Supreme Court has enforced statutory disposition of street property both to the dedicator[40] and to the abutting landowner[41] but on the basis of reasoning that militates against anyone other than the dedicator taking the property.[42] The court has

[29] See note 22 *supra*. Similarly, the abutting landowner acquires not only his title to the street adjacent to his property, but also an access easement over the other abutting landowners' fees in whatever streets he needs for purposes of ingress to and egress from his property.

[30] See note 20 *supra*.

[31] See note 26 *supra*.

[32] N.C. GEN. STAT. § 136-96 (1964).

[33] *Ibid.*

[34] See note 14 *supra*.

[35] See note 21 *supra*.

[36] The private access easement must have terminated before the street can be discontinued. See note 24 *supra*.

[37] N.C. GEN. STAT. § 153-9(17) (Supp. 1965).

[38] N.C. GEN. STAT. § 136-96 (1964).

[39] See notes 7 & 10 *supra*.

[40] Russell v. Coggins, 232 N.C. 674, 62 S.E.2d 70 (1950); Sheets v. Walsh, 217 N.C. 32, 6 S.E.2d 817 (1940).

[41] Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

[42] See note 43 *infra*.

unequivocally declared that the abutting landowner acquires nothing more than a general access easement.[43] Thus, when a street is discontinued, the dedicator should always be entitled to the property simply because, under this view, he never parted with his title to it.[44] How, then, can the court give effect to a statute allowing the abutting landowners to take the street property when, on the basis of the court's own reasoning, it follows that the dedicator is thereby deprived of his property without due process of law?[45] Yet disposition of street property to abutting landowners was squarely upheld in *Steadman v. Town of Pinetops*.[46]

In trying to effectuate the different statutory mandates while simultaneously adhering to the principles it has announced, the court has produced a body of case law that is of little assistance in determining the validity of a title to street property at any given time. The statutory conflict could be resolved and a practical solution effected by an amendment to the withdrawal statute[47] providing that the abutting landowner takes the fee in the street upon withdrawal, regardless of who the dedicator was. The abutting landowner has an obvious interest in having the strip of land attach to his property when the street is discontinued, while the same strip of land without the lots adjacent to it would be of little practical importance to the dedicator. Assuming that lots with street frontage are more valuable than ones without, the abutting landowner probably paid more for a lot with this benefit and, consequently, should

[43] "[T]he owner of *abutting property* has a right in the street . . . [which] is in the nature of an *easement* appurtenant to the property. . . ." Sanders v. Town of Smithfield, 221 N.C. 166, 170, 19 S.E.2d 630, 633 (1942). (Emphasis added.) "Purchasers of lots sold with reference to the recorded map . . . acquire vested rights to have all and each of the streets shown on the map kept open." Town of Blowing Rock v. Gregorie, 243 N.C. 364, 368, 90 S.E.2d 898, 902 (1956). "The original owners, having sold lots with reference to the plat . . . are estopped to deny, as against the purchasers of lots, the existence of the *easement* in . . . a purchaser of a lot. . . ." Broocks v. Muirhead, 223 N.C. 227, 232, 25 S.E.2d 889, 892 (1943). (Emphasis added.)

[44] See notes 14 and 22 *supra*.

[45] "The Legislature cannot sanction the *taking* of one's property unless (a) in satisfaction of a legal obligation, or (b) for a public purpose (citing cases); and when taken for a public purpose, just compensation must be paid." *In re* Trusteeship of Kenan, 261 N.C. 1, 8, 134 S.E.2d 85, 91 (1964). According to the reasoning of the North Carolina Supreme Court, statutory disposition of street property to the abutting landowners falls into neither of these categories.

[46] 251 N.C. 509, 112 S.E.2d 102 (1960).

[47] N.C. GEN. STAT. § 136-96 (1964).

be entitled to his money's worth when the street is discontinued.[48] To be certain that the abutting landowners' property rights under the statutes are protected from judicial interference,[49] both the withdrawal statue[50] and the vacation statute[51] could also provide that the abutting landowners take the fee in the streets unless the dedicator expressly reserved it. Such an amendment would negate the possibility of the dedicator's due process argument against the abutting landowners who statutorily would be entitled to the street property. Should the dedicator wish to retain the fee when he dedicates streets, he is required to do no more than make his desire explicit to protect his interests from application of the statutes.[52] These amendments would definitively resolve the existing conceptual conflict evidenced by the court's treatment of the problem, and would eliminate any necessity for time-consuming litigation of rights under the statutes as they now stand.

SUSAN HAUGHTON EHRINGHAUS

[48] For a good discussion of the reasons why such a rule should apply, see Finlaw v. Hunter, 87 Ohio App. 543, 96 N.E.2d 319 (1949).

[49] That is, judicial interference because of the constitutional issue involved.

[50] N.C. GEN. STAT. § 136-96 (1964).

[51] N.C. GEN. STAT. § 153-9(17) (Supp. 1965).

[52] Such a requirement is not an unreasonable burden on the dedicator. If he has not reserved the fee, he will be presumed to have surrendered it to the abutting landowners.